Supreme Court, U.S.
FILED
APR 18 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1644

LLOYD F. and ELOISE L. CANFIELD,

Petitioners,

v.

THE CITY OF NEW YORK,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACK WEINBERG
345 Park Avenue
New York, New York 10022
(212) 593-3000
Counsel for Petitioners

Of Counsel
GRAUBARD MOSKOVITZ MCGOLDRICK
DANNETT & HOROWITZ
HERMAN E. GOTTFRIED

April 18, 1980

TABLE OF CONTENTS

		Page in Appendix
Appendix A	Opinion of the United States District Court For the Southern District of New York	1a-145a
Appendix B	Judgment of the District Court	1b-2b
Appendix C	Opinion of the United States Court of Appeals For the Second Circuit	1c-28c
Appendix D	Judgment of the Court of Appeals	1d-4d
Appendix E	Orders of the Court of Appeals Denying Rehearing and Rehearing *in banc*	1e-4e
Appendix F	Constitutional, Statutory and Regulatory Provisions Involved	1f-14f

		Page in Appendix
Appendix G	Map Showing the Delaware River and Three City Reservoirs	1g
Appendix H	Legislative History of Delaware River Basin Compact § 14.19	1h-4h
Appendix I	Memorandum Acknowledging that New York City Pays Damages to New York State Riparian Landowners	1i-3i
Appendix J	N.Y. Times, 9/30/79, Col. 1, p. 36	1j-4j
Appendix K	City's Revenues from Water Charges, as Reflected in the Comptroller's Reports for Fiscal Years 1970-1977	1k
Appendix L	Report of the Special Master, New Jersey v. New York, 283 U.S. 336 (1931) Record, Index No. 64, Original at 23 and 41	1L-2L
	Connecticut v. Massachusetts, 282 U.S. 660 (1931), Record, Index No. 15 at 27-28	2L-3L
	Hinderlider v. La Plata, 304 U.S. 92 (1938), Record, Index No. 437 at 53	3L-4L

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

GEORGE ELWOOD, Administrator of the Estate of Beatrice A. Van Loan,

Plaintiff,

- against -

THE CITY OF NEW YORK,

Defendant.

62 Civ. 2562-CLB

----------X

LLOYD F. CANFIELD and ELOISE L. CANFIELD,

Plaintiffs,

- against -

THE CITY OF NEW YORK,

Defendant.

71 Civ. 5568-CLB

AND 3 OTHER RELATED ACTIONS.
----------X

FINDINGS AND CONCLUSIONS

Brieant, J.

These five actions, consolidated for trial, have been brought by, or in the name of, owners of riparian land situated in Pennsylvania, who claim that the value of their lands along the Delaware River

and its West Branch was diminished by the City of New York's diversion of the headwaters of the Delaware River for public water supply purposes.

The Court has subject matter jurisdiction based upon diversity of citizenship of the parties at the dates of commencement of the actions, pursuant to 28 U.S.C. § 1332(a)(1). Trial was before the Court without a jury, commencing on June 2, 1975. Post-trial briefs, memoranda and submissions of the parties have been read and considered.

The Delaware River

An understanding of the location, design and operation of that portion of the New York City water supply system drawn from the Delaware River is essential to an understanding of this litigation. The Delaware is one of the major rivers on the Atlantic seaboard. From its sources

in New York State to Delaware Bay, the River runs 410 miles, and drains a watershed of some 12,765 square miles. The Delaware River has two main branches, the East Branch and the West Branch. The West Branch rises north of Stamford, New York in Delaware County. The East Branch has its origin near Margaretville, New York. On its way to the sea, the Delaware River is joined by many streams and tributaries.

The two branches join at Hancock, New York. Thereafter, the River flows in a generally southeasterly direction. Commencing near Deposit, New York, the West Branch forms the boundary line between New York and Pennsylvania. At Tri-State Rock, near Port Jervis, New York, the boundaries of New Jersey, New York and Pennsylvania converge. Below Tri-State Rock, the River constitutes the boundary between New Jersey and Pennsylvania. The

Lehigh River joins the Delaware near Easton, Pennsylvania. At the head of Delaware Bay near Wilmington, Delaware, it discharges into the Atlantic Ocean.

Pursuant to proceedings in the Supreme Court, discussed below, the City of New York constructed Pepacton Reservoir, on the East Branch of the Delaware near Downsville, New York. This, and all of the City's reservoirs discussed herein are located entirely in New York State. No part of New York City is located in the drainage basin of the Delaware or any of its tributaries.

Impoundment of water behind the dam erected to create the Pepacton Reservoir began in September 1954; the first diversion to New York City occurred in January 1955; and the dam spilled for the first time on April 16, 1956. Pepacton Reser-

voir is 180 feet deep at its deepest point, and has a capacity of some 147 billion gallons. The drainage area impounded by Pepacton is 371 square miles.

Thereafter, the City constructed Cannonsville Reservoir, on the West Branch of the Delaware near Stilesville, New York. Impoundment at the Cannonsville Reservoir began in September 1963; the first diversion to New York City occurred in January 1964; and that dam first spilled on May 9, 1967. The Cannonsville Reservoir has a maximum depth of 150 feet and a capacity of 97.4 billion gallons. The drainage area impounded by Cannonsville is 450 square miles. On the Neversink River, a tributary of the Delaware, the City also has the older and smaller Neversink Reservoir, impounding a drainage area of 92 square miles and having a maximum storage capacity of 37.1 billion gallons.

The premises of the plaintiffs described below, are all, except for Van Loan, located downstream of the confluence of the West Branch and East Branch of the Delaware, and above the point where the Neversink River enters the Delaware. The Van Loan property is situated upstream from Hancock, near Ball's Eddy, New York, and is affected only by operation of the Cannonsville Reservoir.

Water flows in the Delaware River are affected by the impoundment activities of third parties. Lake Wallenpaupack in Pennsylvania has been dammed by a hydroelectric generating station. It contains a drainage area of 228 square miles, and discharges into the Delaware through the Lackawaxen River at a point upstream from Barryville, New York, and also upstream from the Montague, New Jersey gauging station, mentioned below. As electric

demand varies, the amount of impounded water being released increases or decreases. A similar project on the Mongaup River in New York State has a similar effect. The Mongaup also joins the Delaware above Montague, New Jersey.

All plaintiffs are located upstream from the Lackawaxen, Mongaup and Neversink Rivers. Streamflow in the Delaware at their parcels is not augmented when water is released downstream by the City from the Neversink Reservoir, or by the generation of electric power by unrelated persons on the Lackawaxen and the Mongaup.

The function of the three City reservoirs mentioned above is to impound spring runoff, store it during periods of little or no rainfall, and divert the stored water from the watershed of the Delaware to the Hudson River Valley by means of the Delaware Aqueduct System.

The water is used by the City of New York, and, to a minimal extent, also by other New York communities situated along the course of the Aqueduct. After use, it is discharged into drainage basins other than that of the Delaware River, generally the Hudson River and New York Bay.

The term "diversion" is neutral in the law. It can indicate the perfectly proper "ordinary and domestic uses," York Haven Water & Power Co. v. York Haven Paper Co., 201 F. 270, 275 (3d Cir. 1912), to which every riparian owner can turn the waters of a stream flowing through or at the boundary of his land, so long as he returns the residue to the stream within the boundaries of his land. See, Mayor v. Commissioners, 7 Pa. 348, 367-68 (1847). To be lawful, such uses need only be reasonable. Where, however, a riparian owner's uses of the waters of a stream un-

reasonably deprive a downstream riparian owner of the value of his location, see, Williams v. Fulmer, 151 Pa. 405, 414 (1892), by changing the channel, direction, flow, stage, quality, etc., of the stream -- all of which are summed up in the common law phrase "currere solebat," -- the diversion invades a valuable property right of a downstream owner and is actionable. See, United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 702 (1899); Hackensack Water Co. v. Village of Nyack, 289 F.Supp. 671 (S.D.N.Y. 1968). The permanent massive diversion of water out of a channel for uses outside the drainage area and unconnected with the ownership and use of riparian land, as, for example, to add to the water supply of a community that is not within the drainage area of the stream, is unreasonable. See, e.g., Standard Plate Glass Co. v. Butler

Water Co., 5 Pa. Super. Ct. 563 (1897).

At the present time, New York City relies on three principal sources to meet its water supply needs. The two older sources are the Croton System, on the Croton, Bronx and Byram Rivers, and the Catskill System, on Esopus Creek and Schoharie Creek. The Delaware System, comprising the reservoirs on the East and West Branches and on the Neversink River, is the City's most recent source of supply and provides fully 50% of the City's needs. Since in years of normal rainfall the available water exceeds requirements, the City can and does draw at varying times greater or lesser amounts from its different sources, having regard to operating costs, pending maintenance and repair projects, comparable quality, tastes and odors, and related operating criteria. Because of its larger size, and the rela-

tively smaller human population and industrial activity in the watershed area, Delaware water is regarded as the best quality water presently available from the various City sources. New York chlorinates its supply but has not yet found it necessary to filter or otherwise treat its water, as do most communities.

The Parties and Their Properties

The lands of four of the plaintiffs here are located on the Pennsylvania side of the main body of the Delaware River between Hancock, New York and Narrowsburg, New York. The property of one of the plaintiffs, Van Loan/Elwood, is located on the Pennsylvania side of the West Branch, above Hancock, New York near Ball's Eddy. All are located upstream from Montague, New Jersey, and upstream from the points where the Lackawaxen, Mongaup and Neversink Rivers join the Delaware.

(1) Van Loan/Elwood. Mrs. Beatrice Van Loan was the first of these plaintiffs to commence action against the City. Consequently, the procedural history of her action is the most complex.

Mrs. Van Loan owned 124 acres of land with approximately one-half mile frontage on the West Branch of the Delaware, about five miles above the confluence of the East and West Branches at Hancock, New York. Hers is the only property not located on the main body of the Delaware. She bought the property in 1922, and operated a dairy farm at the time of her death.

On July 23, 1962, she filed her original complaint seeking to enjoin construction of the Cannonsville Reservoir, then being built some 10 miles upstream from her property. She alleged that since no express statutory provision had been made by New York State to compensate

Pennsylvania riparians for the City's damage to riverfront property, the City's action constituted a "taking" without compensation.

By a Memorandum Opinion dated November 14, 1963, the late Judge McLean of this Court dismissed Van Loan's complaint as premature, since the Cannonsville Dam had not yet been completed and would, when complete, cause no injury for which money damages would not be adequate compensation. Judge McLean granted leave to amend the complaint when the dam was completed.[1/]

Mrs. Van Loan died testate in May 1965. By a Memorandum Decision dated May 31, 1966, Judge Wyatt of this Court allowed the filing of an amended complaint by George Elwood, the ancillary administrator d.b.n., c.t.a. of Mrs. Van Loan's Estate, who had been appointed after the resignation of the named executor. The amended

complaint was filed on May 4, 1966.

On November 12, 1966, the administrator sold the Van Loan property at auction for $15,200.00. Title was conveyed on February 23, 1967. The administrator's deed expressly reserved all rights against the City of New York, for past or future damages or the taking. The Deed (Ex. 39) reads in relevant part as follows:

> "ALSO EXCEPTING AND RESERVING unto the seller, the heirs, legatees and devisees of the Beatrice VanLoan Estate or their assigns, a claim or claims against the City of New York arising out of and by reason of rights heretofore acquired and to be acquired in connection with the past and future diversion of the West Branch of the Delaware River which has already and will cause a decrease in the market value of the real estate being sold, and for business damages heretofore incurred, and all aspects thereof."

For a discussion of the effect of this Reservation of rights see text infra, pp. 52-53.

On August 7, 1967, Judge Bonsal of this Court denied cross-motions for summary judgment in the Van Loan/Elwood action, holding that apparent disputed factual issues were present. Elwood v. City of New York, 271 F.Supp. 62 (S.D.N.Y. 1967).

By a Memorandum Decision dated March 27, 1973, Judge Pierce of this Court dismissed the Elwood complaint for failure to allege the filing of a Notice of Claim pursuant to New York General Municipal Law §§ 50-e and 50-i. However, in light of plaintiff's claim of a continuing trespass, leave to amend the complaint on filing of a Notice of Claim was granted. The Court noted that "the initial period of the claim would be limited by this late filing to encompass trespass only up to 90 days before the notice of claim was filed," citing Hackensack Water Co. v. Village of Nyack,

289 F.Supp. 671 (S.D.N.Y. 1968).

Elwood filed his Notice of Claim on April 24, 1973, and on June 11, 1973 filed his amended complaint.

(2) Badgley. Mrs. Lillian Badgley commenced her action against the City on July 15, 1966. In 1958 she and her husband had purchased approximately two acres of land with 530 feet of River frontage on the main body of the Delaware River just above the Lake parcel. They paid $22,500.00 for the property and she claims to have made some $40,000.00 worth of improvements on the property in order to make it into a resort. Her husband, Foster Badgley, died in 1965, and as a result, title vested in her. She has since remarried, to one Dixon, but retains title to the property in her prior name.

Mrs. Dixon filed her Notice of Claim against the City on May 24, 1972.

On March 22, 1973, on the City's motion in Lake, Badgley and in a third case, Duryea Pine Flats Hunting Lodge, 66 Civ. 2151, which is no longer pending,[2] this Court issued a Memorandum Decision dismissing the complaints with leave to amend the complaints to include proper allegations of filing the required Notices of Claim.

That decision held that, although the plaintiffs could not avail themselves of Title K of the Administrative Code of the City of New York,[3] and although, for the reasons therein stated, they had suffered no extraterritorial "taking" of their Pennsylvania property by the City of New York, they were entitled to pursue their actions for a continuing trespass, and to recover "damages not only to the date of judgment, but for anticipated future injury to the property during the foresee-

able life of the diversion works, or in perpetuity." Id. at 4.

Decision was reserved on the question whether, under Pennsylvania law, "one who conveys title may reserve to himself [in his deed of conveyance] the right to assert a claim for a permanent continuing trespass in futuro," but I rejected the City's defenses based on the interstate allocation of the waters of the Delaware River:

> "Nothing is found in New Jersey v. New York, 347 U.S. 995 (1954), or in the Delaware River Basin Compact, as approved in Pub. Law 87-328, or in any Pennsylvania statute enacted pursuant thereto, which implies otherwise." Id. at 10.

An amended complaint in Badgley was filed thereafter, on April 25, 1973.

(3) Lake. Emil and Helen Lake filed their complaint against the City on July 15, 1966. At that time they owned

some 15 acres, bought in 1945 and 1951 for approximately $4,200.00, with 600 feet of frontage on the main body of the Delaware just upstream from the Gregory parcel, described below.

On September 27, 1968 the Lakes sold their property for $18,500.00. By recital essentially the same as that found in the Elwood/Van Loan deed, they reserved all rights against the City of New York.

On May 23, 1972, alerted by the pending City motion to dismiss in Gregory v. City of New York, supra, the Lakes filed the Notice of Claim required by the General Municipal Law, and amended their complaint on April 4, 1973.

(4) Gregory. George and Helen Gregory commenced their action against the City of New York on July 15, 1966. They are New Jersey residents, who, in 1960, purchased 124 acres of riparian land

in Pennsylvania with some 4,000 feet of frontage on the Delaware River. They paid $20,000.00 for the property, which included at the time of purchase a house, barn, sauna and four cottages. Between 1964 and the time of trial they sold some 34.5 acres of their land, including 3,323 feet of River frontage, for $48,900.00, and retained at the time of trial some 89 acres and 750 feet of frontage. The Gregory parcel is located some 39 miles downstream from the Pepacton Reservoir, and 22 miles downstream from the Cannonsville Reservoir.

In a prior decision [Gregory v. City of New York, 346 F.Supp. 140 (S.D.N.Y. 1972)], familiarity with which is assumed, this Court held that the Water Supply Act, Title K, Chapter 51 of the Administrative Code of the City of New York, which prescribes a procedure by which owners can be

compensated for the City's impairment of their riparian rights, was not available to holders of property in Pennsylvania, but that both New York and Pennsylvania law provided a cause of action to recover damages, if any, resulting from the City's continuing trespass. However, the original Gregory complaint was dismissed because of the plaintiffs' failure to file the Notice of Claim required by Sections 50-e and 50-i of New York's General Municipal Law. Plaintiffs were granted leave to file the Notice, and thereafter, an amended complaint alleging a continuing trespass to their rights as riparians to the extent not time barred. On May 25, 1972, these plaintiffs filed their Notice of Claim, and on July 27, 1972, filed an amended complaint demanding $50,000.00 damages for the City's continuing trespass.

The claims alleged in the Gregory's amended complaint are typical of those made by all plaintiffs in this consolidated action, and are as follows:

> "That by reason of the aforesaid diversions of the [Delaware] river and the trespasses by the defendants herein and absence of water in said river at the plaintiff's premises downstream therefrom, and the permanence of said diversion and of said trespasses and past, present and future operation by the City of New York of said dams at Cannonsville and Downsville, and the said Pepacton and Cannonsville Reservoirs, the said river has and will become a swamp, fishing therein has [been] and will be destroyed, and the river will become oderiferous, unsightly, and will be unable to provide plaintiff's property with ground water and surface water, will decrease the fertility of said property, will make such property unsuitable for recreational purposes, all of which has and will greatly decrease the market value of the plaintiff's property and cause damage thereto by reason of the foregoing and other effects of said diversions and trespasses too numerous to mention, all to the plaintiff's damage ...." [¶ 9, matter in brackets added.]

(5) Canfield. Lloyd and Eloise Canfield filed their complaint against the City on December 22, 1971, at which time they owned 166 acres on the main body of the Delaware with about 6,700 feet of River frontage. Their Notice of Claim against the City was filed on October 20, 1971, and was properly pleaded in their complaint.

In 1954 Canfield acquired title to the property, then consisting of 278 acres, for $5,000.00 from his half brother, Grant Lee Canfield, a minor under the age of 14 years. This was accomplished through a judicial proceeding in a Pennsylvania court in which the Wayne County Savings Bank as guardian of the Estate of Grant Lee Canfield, sold the premises to these plaintiffs for $5,000.00.[4/]

The Court has visited each of the premises affected by this litigation and

has made a personal inspection thereof in the presence of counsel for all parties. The price of $5,000.00 paid for the Canfield property, even in 1954, could not be, and is not regarded as reflecting an arms length sale. The price which a fully informed seller under no necessity of making a prompt sale would receive from an unrelated purchaser, in an arms length sale would be much larger.

In a Memorandum Decision dated May 11, 1972, Judge Tenney of this Court denied the City's motion to dismiss the Canfield action, holding that the plaintiffs had a cause of action for a continuing trespass, and that the measure of damages for such trespass was the same as that provided in Title K of the Administrative Code of the City of New York, to wit: the difference between the market value of the property with the City's diversion of

the stream and the market value without such diversion.

Class action status was denied in the Canfield case after the decision of the Supreme Court in Zahn v. Int'l. Paper Co., 414 U.S. 291 (1974). The Canfields had participated unsuccessfully in the Zahn case as amicus curiae favoring plaintiff Zahn's position. They had planned to assert the interest of all downstream owners adversely affected by the diversion. Some part of the delay in the case arose while the parties awaited the resolution of the Zahn class action issue.

Proceedings Affecting the Delaware River; The River Master

Beginning in 1929, the City of New York planned the diversion of the Delaware River and its tributaries to meet the increasing municipal water supply needs of the City, and other municipalities dependent on the City for all or part of such supply.

To restrain this proposed diversion, the State of New Jersey began an original suit in the Supreme Court against the State of New York and the City. Pennsylvania intervened to protect its own sovereign interests in the Delaware River. New Jersey v. New York, 283 U.S. 336 (1931).

The Supreme Court found the River and its tributaries "a necessity of life [to] be rationed among those who have power over it," id. at 342, and applied the federal common law doctrine of equita-

ble apportionment, to allow the City to divert from the Delaware watershed up to 440 million gallons of water a day, provided certain stream management conditions were met. Principal among these was the requirement that a sewage treatment plant be constructed at Port Jervis, New York, to lessen the accumulated pollution present in the diminished downstream flow of the River. A constantly maintained flow of .50 c.s.m. (1,535 c.f.s.) was also required to be maintained at Montague, New Jersey, just below Port Jervis.

The Supreme Court retained continuing jurisdiction over its equitable decree in order to adjust the rights of the parties as equity might require in the future. The Court explicitly held that the diversion should "not constitute a prior appropriation, and shall not give

the State of New York and City of New York any superiority of right over the State of New Jersey and Commonwealth of Pennsylvania in the enjoyment and use of the Delaware River and its tributaries." Id. at 347.

Until 1953, when the Neversink Reservoir was completed, the City did not avail itself of its right under this decree to withdraw 440 m.g.d. from the Delaware and its tributaries. The Neversink is tributary to the Delaware at a point downstream from the properties which are the subject of this suit. These plaintiffs were not affected by the diversion of water from the Neversink. Those waterworks are involved here only insofar as releases from Neversink Reservoir form one element contributing to the combined minimum flow that must be maintained at Montague, New Jersey under the Supreme

Court's revised Decree of 1954. For a discussion of compensation of riparians on the Neversink River, see In re Ford (Whitton), 35 App.Div.2d 626 (3d Dept. 1970). All such properties are in New York State.

In 1952, the City, with the approval and support of New York State, petitioned the Supreme Court for a modification of the 1931 Decree which would allow additional diversions of water from the Delaware by means of proposed dams at Cannonsville and Downsville (Pepacton) New York. The petition was allowed. New Jersey v. New York, 343 U.S. 974 (1952). A motion by the City of Philadelphia to intervene in the proceedings to protect its interests in the River was denied on the finding that its rights were "invariably served by the Commonwealth's [i.e., Commonwealth of Pennsylvania's] position."

345 U.S. 369, 374 (1953).

In 1954, the Supreme Court modified and superseded its 1931 Decree. 347 U.S. 995 (1954). Under the terms of the new Decree, the City was allowed to continue the diversion of 440 m.g.d. from the Delaware and its tributaries until the completion of the Pepacton Reservoir then under construction on the East Branch, at which time it could begin to divert 490 m.g.d., subject to a requirement of maintaining a flow of 1,525 c.f.s. at Montague, New Jersey. After the completion of the Cannonsville Reservoir on the West Branch of the Delaware, the City was authorized to divert the full amount of 800 m.g.d. on a cumulative average basis, subject again to the requirement of maintaining a minimum flow of at least 1,750 c.f.s. at Montague, New Jersey.

In addition to the aforementioned

minimum flow requirement at Montague, New Jersey, the City is also required to release an "excess release quantity" of its impounded water into the Delaware. Essentially, this is a device to enable the City gradually to adapt to increased demands for water. On the first day of each calendar year, the City is required to make an estimate of its total annual consumption of water from all sources (excluding pumping) for the next year. This estimate is based on the maximum consumption for any previous year plus an annual increment of 7.25 billion gallons. The City is then required to release over any 120 day period after the fifteenth day of June of each year, an additional amount of water into the Delaware equal to 83% of the amount by which its estimated consumption and yearly increment exceed 1,665

m.g.d. (the City's minimum "safe yield" from all sources, excluding pumping, as determined by the Supreme Court). In no calendar year is this "excess release quantity" of water so computed required to exceed 70 billion gallons, and the City is never required to maintain a flow at Montague, New Jersey greater than 2,650 c.f.s. Since 1968, as New York City's consumption has increased, this "excess release quantity" has steadily diminished. At the time of trial, the flow at Montague, New Jersey was being maintained at approximately 2,000 c.f.s.

Under the system of stream management established by the Supreme Court, any daily diversion, no matter how large, is permitted from any one or all of the three reservoirs (Pepacton, Cannonsville and Neversink) so long as the required minimum flow at Montague, New Jersey is main-

tained, and so long as the quotient of the total amount of water diverted that year, divided by the number of days of the year to that date, does not exceed 800 m.g.d., and so long as it satifies the "excess release quantity" provision.

In its 1954 Decree, the Supreme Court appointed a River Master, the Chief Hydraulic Engineer of the United States Geological Survey, to oversee and implement the Decree. It is the River Master's duty to require the City to maintain the required flow at Montague. Under the Decree, the City is not required to make any releases of impounded water unless and until the River Master calls for them. On at least one occasion, during the drought in June 1965, the City has refused to comply with the River Master's requests for increased flow.[5/]

Under the provisions of the revised Decree, the Supreme Court continued to retain jurisdiction over the controversy. 347 U.S. at 1005. The City has a continuing equitable duty to develop its available sources of water to meet its increasing needs, by the construction of additional impoundment and storage facilities, and by developing those other sources, including the Hudson River, directly available to it, and can be required to do so by the Supreme Court. All parties have assumed, correctly, that in times of unusually high consumption, drought, fires or similar situations of short or long duration, the City would discharge its obligations to the public consumers of water prior to performing its duties owed under the Decree to downstream communities and riparian owners. When and how

often in the future the City, will refuse ex necessitate to comply with the River Master's requests presents a question which is primarily speculative, but plaintiffs and the Court must assume that such occasions will arise again during the existence of these Dams, as happened in 1965.

A more serious and recurring problem with this regulatory scheme from the point of view of these plaintiffs is that the River Master is unconcerned, nor is he required to be concerned, with the sources of the required minimum flow at Montague. In planning how to assure the daily flow at Montague, the River Master must and does take into account the anticipated releases resulting from electric power generation on the Mongaup and the Lackawaxen (Lake Wallenpaupack), described supra, p. 4.

These electric generating utilities each make independent determinations as to the amount of water which will be discharged. Such determinations are based only on the economics of the electric generating activities of the utility, and the demand for power. The amounts of such discharges are unpredictable, and vary significantly from day to day. There is no provision in the Delaware River Compact or the Supreme Court's Decree by which the River Master can require the power plant operators to make any minimum release from impounded water on any particular date, in addition to that needed for power generation. Presumably, provisions authorizing any such direction would require compensation to be made to the power plant owners.[6/]

Uncontradicted testimony at trial showed that the River Master has relied increasingly over the years on these power plant releases to make up the required flow at Montague. Only when the projected run-off of all upstream tributaries and the projected releases of the two power plant reservoirs are anticipated to produce less than the minimum required flow at Montague Gauging Station does the River Master call on the City for net releases from its dams. These demands, in a typical year, range from zero to as much as 1.5 billion gallons on a given day.

Once a demand has been made upon the City for releases to maintain the required flow at Montague, the City is faced with a choice of three reservoirs (Cannonsville, Pepacton, Neversink) from any or all of which it may make the required re-

leases in whole or in part.

The testimony of the City's expert witness, Mr. Paul Blomquist, former head of the Bureau of Claims of the Board of Water Supply for the City, establishes the existence of a general policy of the City to make major releases through the Cannonsville dam because of its greater release capacity (2,440 c.f.s., as compared with 760 c.f.s. from the Pepacton Reservoir).[7/]

On numerous occasions these releases from the Cannonsville Reservoir into the West Branch have amounted to approximately One Billion Gallons during a day.

A second decision facing the City is the time span within which to make its required releases. The River Master requires only an <u>average</u> daily flow at Montague, and it is within the discretion of the City to release the required

amounts over the whole 24-hour period, or in some shorter time. No evidence was introduced, however, which would indicate that such precipitous releases have ever been made by the City.

The final element affecting the flow of water in the River is the "conservation releases" that the City is required by order of the New York Supreme Court to make daily from each of its reservoirs releasing into the Delaware River. Such releases must be made independently of any called for by the River Master, but they are taken into consideration by the River Master in projecting the flow at Montague. The Cannonsville Reservoir is required to release 15 m.g.d. during the summer (April 16th through November 30, inclusive) and 5 m.g.d. during the winter (December 1st through April 15th, inclusive); the Pepacton

Reservoir is required to release 12 m.g.d. during the summer (April 8th through October 31st, inclusive) and 4 m.g.d. in the winter (November 1st through April 7th, inclusive). These figures were arrived at on the basis of pre-diversion low flows in the West and East Branches, and were ordered in order to maintain the environmental quality of the River. It has frequently happened that these "conservation releases" were, over extended periods of time, the only waters released into the Delaware River from the City's reservoirs. The right to have such "conservation releases" continued into the indefinite future is, of course, not graven in stone, nor do these plaintiffs have any vested property right in their perpetuation.

All the City's dams release water into the Delaware River from spillways or

outlets at the bottom of the dam.

Because the required minimum flow is implemented at the Gauging Station at Montague, New Jersey, downstream from Port Jervis, when the River Master calls upon the City to release water from its various impoundments, he does so based only on the flow at Montague, and makes no specification as to the facility from which the City shall make the required releases.

As a result, the flow of water past plaintiffs' premises on any given day is not directly assured by provisions of the Decree and of the Compact, all of which are directly related to the flow at Montague, New Jersey, affected in great degree by power company releases and Neversink releases, which, as noted, enter the Delaware upstream of Montague, but downstream from plaintiffs' properties. The various facilities, drainage areas and

their relative locations with respect to each other and the plaintiffs' premises are all set forth in Defendant's Ex. A.

The Delaware River Compact and New York's Environmental Conservation Law

In 1961, all of the states touching on the Delaware River and affected by its flow entered into an Interstate Compact, with the approval of Congress, creating a Commission to regulate all diversions of water from the Delaware. Pub.L. No. 87-328, 75 Stat. 688 (1961). Section 3.5 of the Compact specifically prevented the Commission from impairing rights created by the Decree in New Jersey v. New York in 1954, except by the unanimous consent of the parties to that Decree. Under section 3.4, the parties relinquished, with certain immaterial exceptions, their rights to apply to the Supreme Court for a modification of the 1954 Decree.

On July 27, 1976, without consultation with the other signatory parties to the Compact or with the parties to the 1954 Supreme Court Decree, New York enacted an amendment to Title 15 of the New York Environmental Conservation Law, entitled "Regulation of Reservoir Releases." Although this occurred after the trial in this matter, the record in the case was re-opened and a hearing held on September 14, 1976, in order to consider the effect, if any, of the new statute.

The legislative findings accompanying the amendment are in relevant part as follows [matter in brackets added]:

> "[T]he legislature hereby finds that the volume and abrupt changes in the volume of releases of water from impounding reservoirs of water having a capacity of more than one billion gallons [including the Cannonsville and Pepacton Reservoirs] and located in the counties of Delaware, Greene, Putnam, Schoharie, Sullivan, Ulster and Westchester have damaged the re-

> creational uses, such as trout fishing and canoeing, of waters affected by such releases, that such waters are a recreational resource for residents from all parts of the state of New York and elsewhere, that such recreational resource benefits the economy and welfare of this state and that the volume and rate of change of volume of such releases can be regulated to protect and enhance the recreational use of waters affected by such releases while ensuring and without impairing an adequate supply of water for power production or for any municipality which uses water from such reservoirs for drinking and other purposes." (N.Y. Envir. Conserv. L. § 15-0801).

Under the provisions of the law, the New York Commissioner of Environmental Conservation is empowered to promulgate rules regulating the "volume, timing and rate of change in volume of releases of water" from impounding reservoirs in order to achieve the purposes of the Act. Id. § 15-0805(2).

The new statute is silent on the effects, if any, of the 1954 Supreme Court

Decree or the Interstate Compact on the Commissioner's powers.

In late 1976, at the request of the Supreme Court, the parties to the 1954 Decree submitted memoranda concerning the effect, if any, of the New York legislation on that Decree. In its Memorandum, the State of New York concedes, as it must, that "the new law cannot legally conflict with the Decree, [and consequently] must be enforced so as to dovetail directly with the Decree." Memorandum at p. 7. The proposals for regulations submitted to the Commissioner by the State incorporate this principle. Id.

By a letter of January 22, 1977, the Clerk of the Supreme Court advised the River Master that the Court contemplated no further action in the matter.

In June 1977, the parties to the

1954 Decree signed a Memorandum of Agreement stipulating to a two-year redistribution of the "annual excess quantity" commencing on June 1, 1977. The River Master approved this Agreement on July 7, 1977.

Under the provisions of the June 1977 Agreement, the Pepacton Reservoir must release 70 c.f.s. of water each day from April through October of each year, and 50 c.f.s. daily from November through March. The Cannonsville Reservoir must release 45 c.f.s. daily from April 1st through June 14th; 325 c.f.s. daily from June 15th through August 15th; 45 c.f.s. daily from August 16th through October 31st; and 33 c.f.s. daily from November 1st through March 31st, each year. In addition, at times and from reservoirs to be determined by the State of New York, an amount not to exceed 6,000 second-

foot-days per year must be released. The stated purpose of the releases is to prevent, as far as possible, the water temperature of the Delaware from exceeding 75° F., as measured at Callicoon, New York.

This Agreement between the parties to the 1954 Decree obviates, at least until its expiration in May 1979, any possible conflicts between the New York legislation and the Supreme Court Decree. In essence, the Agreement merely redistributes the "excess release quantity" on a daily basis, rather than over a 120-day period. The schedules governing the releases will be met only "to the extent the annual excess quantity will permit ...." Memorandum of Agreement at 2. Over the year, no quantity of water will be released into the Delaware greater than the

amount which would have been released under the superseded system. Furthermore, it is implicit in the regulatory scheme that any excess releases are subject to the paramount needs of the City's water consumers in the event of extreme drought and/or temporary failure of the Croton or Catskill systems.

On November 2, 1977, the Commissioner of Environmental Conservation issued the regulations required by section 15-0805 of New York Environmental Conservation Law. 6 N.Y.C.R.R. Part 671.1. The regulations establish a two-year experimental program running concurrently with, and exactly duplicating the provisions of the June 1977 Memorandum of Agreement entered into between the parties to the 1954 Supreme Court Decree. The results of this experimental program, in turn, will "provide a basis for determining the

manner such [reservoir] releases should be regulated on a long-term basis." 6 N.Y.C.R.R. § 671.1.

These regulations also specifically preserve all rights established under the Supreme Court's Decree, and set the maximum quantity of water to be released yearly under the regulations as the sum of (1) the releases necessary to maintain a flow of 1,750 c.f.s. at Montague, New Jersey, (2) the court-ordered conservation releases; and (3) the "excess quantity" releases required by the 1954 Decree. 6 N.Y.C.R.R. § 671.8.

In essence, the new regulations and the June 1977 Memorandum of Agreement merely provide for a more rational distribution of excess water already required to be released. As we discuss, infra pp. 45-51, a substantial item of damage resulting to plaintiffs from the City's

impoundment and diversion activities on the Delaware and its tributaries is caused by (1) a marked change (decrease) in the average stream temperature of the water, compared to that found prior to the activities complained of; and (2) drastic fluctuations during the summer months occurring as the City makes sudden releases of water from the colder, bottom levels of its dams.

The long-term effect of these releases on ameliorating this situation with respect to water temperatures on the Delaware River is speculative at best. The City has consistently maintained, both before the Commissioner of Environmental Conservation and in this Court, that any requirement in future permanent regulations that quantities of water be released in excess of those ordered by the

River Master would conflict with the 1954 Supreme Court Decree. The City points to the River Master's power over the "supervision and direction" of releases, New Jersey v. New York, 347 U.S. 995, 997 (1954), and to the fact that releases in excess of those required by the River Master have in fact never been made by the City. For our purposes we concur in the validity of the legal position taken by the City, namely that the scheme of river regulation found in the Supreme Court Decree as amended is paramount. While a municipal corporation enjoys no rights under the Fourteenth Amendment against the state which created it, there are probably intervening rights of individual and corporate water users in the City which would be protected in a proper case, arising out of the Supreme Court

Decree.

Plaintiffs' Property Rights Under Pennsylvania Law

In prior decisions in these cases it has been consistently held that under Pennsylvania law riparian property owners enjoy rights in the natural flow of their adjacent streams, for injury to which they are entitled to bring an action for a continuing trespass. Familiarity with these prior holdings is assumed. Because the City has argued at length that all of the cases relied on in prior decisions involve riparian rights on non-navigable rivers, the Court will consider the issue further.

Under our diversity jurisdiction, we are bound here by New York choice-of-law rules. Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941);

Rosenthal v. Warren, 475 F.2d 438 (2d Cir.), cert. denied 414 U.S. 856 (1973). Under the New York conflicts rules, when, as is the case here, the property against which the tort was committed is located in Pennsylvania, and the last act necessary to complete the tort (i.e., the damage) occurred there, the law of Pennsylvania regulates the property rights of the plaintiffs, and defines the tort against those rights. It also determines the recovery. This is so whether the older lex loci delicti rule or the more current "center of gravity" or "grouping of contacts" theory is applied. See, Babcock v. Jackson, 12 N.Y.2d 473 (1963); Conklin v. Canadian-Colonial Airways, 266 N.Y. 244, 248 (1935).

Under the common law of England as applied in most of the states on the

Atlantic seaboard, the holder of lands adjacent to a fresh-water stream, no matter what its size, was presumed to hold title to the stream and its bed ad medium filum aquae (to the center thread of the waters). Such riparian holders accordingly possessed certain extraordinary rights in the stream, such as the right to an exclusive fishery. See generally, Attorney-General v. Philpott (1632) [unreported, but discussed in Attorney-General v. Richards, 145 Eng. Rep. 980 (Ex. 1795)]; S. Moore, A History of the Foreshore and the Law Relating Thereto, 896-907 (3d ed. 1888); Fraser, Title to the Soil under Public Waters--A Question of Fact (pts. 1-2), 2 Minn. L. Rev. 313, 429 (1918).

The contrary presumption prevailed when lands adjoined tidal waters. The holders of such lands were presumed to

hold only to the line of mean-high water. See generally, Dolphin Lane Associates, Ltd. v. Town of Southampton, 37 N.Y.2d 292 (1975); Deveney, Title, Jus Publicum, and the Public Trust: An Historical Analysis, 1 Sea Grant L. J. 13 (1976).

Both of these presumptions were phrased in terms of "navigability": tidal water was by definition "navigable," and fresh water "non-navigable."

This legal system was poorly suited to America, with its great coastal rivers, and historical practice of using mountain streams for driving logs. Accordingly, several states, including Pennsylvania, adopted the rule of the civil law according to which title to lands adjoining rivers which were navigable-in-fact extended only to the line of high or low water, rather than to the thread of the stream. See, Rundle v. Delaware & Raritan

Canal Co., 55 U.S. 79, 90-91 (1852); 3 Kent's Commentaries *430-31 (12th ed. 1873).

It is settled under Pennsylvania law that the main body of the Delaware River is navigable-in-fact. See, Rundle, supra; Fulmer v. Williams, 122 Pa. 191, 15 A. 726 (1888); Carson v. Blazer, 2 Binn. 475 (Sup. Ct. Pa. 1810). Under the criteria there set forth, as well as under the commonly accepted and applied federal criteria, it is clear, and I so find, that all of the sections of the Delaware River relevant to this case, including the West Branch adjacent to the Van Loan/Elwood property, are navigable-in-fact. See, e.g., The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).

The Van Loan/Elwood property is located near Ball's Eddy, less than five miles above the confluence of the East and West Branches of the Delaware. In the last

century, considerable rafting of lumber was done between Hancock, New York and Deposit, New York on the West Branch, and at the time "Ball's Eddy was said by some to be the rafting center of the West Branch of the Delaware, and more timber was reported rafted from [there] than any other one point along this branch." Leslie C. Wood, Rafting on the Delaware River, 179 (Livingston Manor, N.Y. 1934). See also, Report of the Special Master at 83, and Finding of Fact No. 25, at 203, affirmed by the Supreme Court, New Jersey v. New York, 283 U.S. 336 (1931).

Under Pennsylvania law, title to lands adjoining navigable waters runs to low-water mark, with the lands between high and low-water mark being subject to the public's superior right of navigation and fishery. See, Pa. Act of June 25, 1937, P.L. 425 (1937); Shaffer v. Baylor's

Lake Association, 392 Pa. 403, 141 A.2d 583, 585 (1958); Monongahela Bridge Co. v. Kirk, 46 Pa. 112 (1863); Bailey v. Miltenberger, 31 Pa. 37 (1856); Shrunk v. Schuylkill Navigation Co., 14 S. & R. 70, 78-79 (Sup. Ct. Pa. 1826); 3 Kent's Commentaries *427(d) (12th ed. 1873).

Basing its arguments on this rejection by Pennsylvania of the common law doctrine of title to mid-stream on non-tidal rivers, the City has argued that Pennsylvania has also rejected the entire common law doctrine of riparian rights on such waters, and consequently plaintiffs have no rights against which a trespass could be committed.

There is no doubt that some riparian rights held at common law are not possessed by riparian holders on the Delaware River. See, e.g., Shrunk v. Schuylkill Navigation Co., supra and Carson v.

Blazer, supra, which deny such holders an exclusive right of fishery.

The majority of cases referred to by defendant, however, are based on the unquestioned fact that riparians on navigable water in Pennsylvania do not hold title to the water itself, and may use it, for example, as a source of power, only at the will of the state. See, e.g., Rundle v. Delaware & Raritan Canal Co., 55 U.S. 79 (1852); Susquehanna Canal Co. v. Wright, 9 Watts & S. 9 (Sup. Ct. Pa. 1845); Monongahela Navigation Co. v. Coons, 6 Watts & S. 101 (Sup. Ct. Pa. 1843). These cases are totally inapposite here, however, both because they relate to the absolute ownership of the water of a navigable stream--which is not in contention here--and because they are uniformly based on the Commonwealth of Pennsylvania's superior right

to control the flow of streams in aid of navigation. Moreover, even these cases relied on by defendant do not purport to exclude all riparian rights along navigable streams. See, e.g., Mayor v. Commissioners, 7 Pa. 348, 367-68 (1847), which holds that a riparian owner on the navigable Schuylkill River retains the right to reasonable diversion and use of the stream.

At common law, every riparian enjoyed the right to have the stream flow as it was wont to flow:

> "The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream. It is enough, without other citations or quotations, to quote the language of Chancellor Kent, 3 Kent Com. § 439:
>
> 'Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (currere solebat) without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. Aqua currit et debet currere ut currere solebat is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate.'" United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 702 (1899) (emphasis added).

The Pennsylvania courts have frequently affirmed this common law doctrine of riparian rights in relation to non-navigable streams. See, e.g., Scranton Gas & Water Co. v. Del. L. & W. R.R. Co., 240 Pa. 604, 88 A. 24 (1913); James v. West Chester Borough, 220 Pa. 480, 69 A. 1042 (1908); Lord v. Meadville Water Co., 135 Pa. 122, 19 A. 1007 (1890). They have just as frequently made it clear that,

except for exclusive fisheries and rights based on actual possession of the water of a stream, the riparian on navigable waters in Pennsylvania possesses the same rights as a riparian on non-navigable waters.

In Williams v. Fulmer, 151 Pa. 405 (1892), the defendant, an upper riparian owner on the navigable Lehigh River, diverted the stream from plaintiff's dam and defended his actions with much the same contentions as those made here by the City of New York. The Court held that the right to the water power itself had been granted by the Commonwealth exclusively to a third party, "but that the plaintiff was nevertheless entitled to recover for any injury he had sustained by reason of the diversion of the stream from its natural channel along the front of his

land ...." Id. at 413.

> "[Plaintiff] was the owner of land lying upon a navigable stream. The advantages of his location were inseparable from the ownership of the land, and if they increased its desirability or added to its value for purposes of business or of pleasure they were his property as truly as the land itself.
>
> The diversion of the stream was an injury to his land that was direct, peculiar, and not shared with the general public. It was as clearly actionable as the diversion of a stream passing over his land. Whoever brought about such diversion so as to deprive him of the advantages of his location, whatever they were, inflicted a pecuniary wrong upon him. The manner in which the diversion is brought about is not important .... The lower riparian owner would be deprived of the natural advantages which ownership of the land at that point gave him, by the unlawful act of another; and he would have a right to call upon the wrongdoer to repair the wrong done him by restoring the stream to its channel or making compensation for its loss." Id. at 414. (Emphasis added.)

See also, City of Philadelphia v. Commonwealth, 284 Pa. 225 (1925); Citizens Elec-

tric Co. v. Susquehanna Boom Co., 270 Pa. 517 (1921); 39 Pennsylvania Law Encyclopedia, Waters § 219 (1961).

The Third Circuit has summarized Pennsylvania's position on the riparian rights of holders of land on navigable waters:

> "The ordinary rights of the owner of lands along which or through which a nonnavigable stream passes, have been long settled and are well understood. Such owner may use a stream thus flowing for his ordinary and domestic uses, or for any extraordinary purposes, so long as such extraordinary use does not interfere with the rights of others along or through whose lands the stream flows. These rights are incident to the lands in contact with the stream. They pass with the land and do not exist except in relation thereto. Enjoyment of such rights, in whole or in part, however, may be granted by the owner of the land to another, but the grantee has no property therein, and the stipulated enjoyment is only enforceable against the grantor.
>
> The rights of riparian owners on navigable streams are essentially

> of the same character. Generally, they consist of right of access to the stream, as a public highway, and to such use of the water and the flow thereof as will not interfere with the public rights of navigation. There are other subordinate rights, such as the right to wharf into the stream, so far as it may not interfere with the rights of others or with public navigation; the rights of fishery, etc. These rights, which may be called the natural rights of a riparian owner, are incident to the ownership of the land bordering upon the stream, whether navigable or not, and pass to the grantee of such lands without special mention in the deed of conveyance. If notoriously navigable, or declared to be so by legislative enactment, these natural rights are restricted so far as to exclude the right to any serious diversion of the water, by damming or otherwise. On such streams or rivers, the right to dam for milling purposes must be conferred by an exercise of the legislative will amounting to a license." York Haven Water & Power Co. v. York Haven Paper Co., 201 F. 270, 275-76

Accordingly, I find that these Pennsylvania plaintiffs were possessed of all the rights of riparians at common law,

except for those rights, such as exclusive fishery and title to the bed and flow of the stream, that had been excluded by Pennsylvania's modification of the common law.

Most important of these rights was the right to the full natural flow of the Delaware River, both for commercial and recreational purposes, aqua currit et debet currere ut currere solebat. Included in the concept of natural flow is not only the right to an undiminished flow of the stream [Clark v. Pennsylvania R. R. Co., 145 Pa. 438, 22 A. 989 (1891)], but also the right to be free of unreasonable increases or fluctuations in the flow, Kauffman v. Griesemer, 26 Pa. 407 (1856); Miller v. Miller, 9 Pa. 74 (1848); Standard Plate Glass Co. v. Butler Water Co., 5 Pa. Super. Ct. 563 (1897), and incidental rights, such as the right to a water-

table maintained at its natural level. Craig v. Shippensburg Borough, 7 Pa. Super. Ct. 526 (1898).

We have not been cited to, nor able to find a Pennsylvania case directly ruling on the sort of thermal pollution of water involved here, but I believe that the common law of Pennsylvania includes a right to be free from such pollution and from unreasonable fluctuations in water temperature which cause actual damage. A district court sitting in diversity must determine the common law of a state by examining the rationale for a given rule, developments in other states, and analogous areas of other states' law. See, Bernhardt v. Polygraph Co. of America, 350 U.S. 198 (1956). Here, the right claimed exists in other jurisdictions, and presumably would be recognized by Pennsylvania's highest Court if the situation

were to arise. See, Sandusky Portland Cement Co. v. Dixon Pure Ice Co., 221 F. 200 (7th Cir.), cert. denied 238 U.S. 630 (1915).

For a trespass against these riparian rights, in this case a continuing trespass with permanent damage, a cause of action for damages exists under Pennsylvania law. See, Gregory v. City of New York, 346 F.Supp. 140, 144 (S.D.N.Y. 1972); Elwood v. City of New York, 271 F.Supp. 62 (S.D.N.Y. 1967); Cochran Coal Co. v. Municipal Management Co., 380 Pa. 397, 110 A.2d 345 (1955); Clark v. Pennsylvania R. R. Co., 145 Pa. 438, 22 A. 989 (1891); Lord v. Meadville Water Co., 135 Pa. 122 (1890); Craig v. Shippensburg Borough, 7 Pa. Super. Ct. 526 (1898).

Finally, plaintiffs' rights here are not subject to or diminished by any

correlative riparian right of the City to reasonable use of the waters of the Delaware. The Special Master appointed in 1930 in New Jersey v. New York found that the City is not riparian to the Delaware or its tributaries. Report of the Special Master at 36 (1931). Even if the City were a riparian owner, however, its diversion of such enormous quantities of water from the River and out of the Delaware watershed is unreasonable. See, Scranton Gas & Water Co. v. Delaware, Lackawanna & Wester R. R., 240 Pa. 604 (1913); In re Haupt's Appeal, 125 Pa. 211 (1889); Standard Plate Glass Co. v. Butler Water Co., 5 Pa. Super. Ct. 563 (1897).

Defenses Based on the Supreme Court's Apportionment of the Delaware River

Under this heading we discuss all the defenses raised by the City of New

York based on the Delaware River Basin Compact (1961) and on numerous Supreme Court decisions adjudicating the rights of states, among themselves, to interstate streams. Basically, these arguments rest on two propositions: (1) that federal common law governs rights in interstate streams, and rejects the common law doctrine of riparian rights; and (2) that under this federal common law, as applied in New Jersey v. New York, supra, the rights of Pennsylvania in the Delaware River have been adjudicated, thus, under the principle of parens patriae, barring recovery by these Pennsylvania plaintiffs.

These defenses are each unsound, and have been summarily disposed of in several prior decisions in this case, but since the City has briefed them extensively, I will again address them.

The federal common law doctrine of equitable apportionment was developed by the Supreme Court in answer to the problems raised by conflicting claims of states as sovereigns, to the waters of interstate rivers. These conflicts have frequently arisen, often between states with opposed notions of water law. In Kansas v. Colorado, 206 U.S. 46 (1907), for example, Kansas had adopted the common law of riparian rights and accordingly demanded that the Arkansas River flow down to it from Colorado without diminution. Colorado had adopted the Western, or dry-state doctrine of prior appropriation or apportionment.

In these interstate conflicts, the Supreme Court has held that the apportionment of waters, as between the sovereign states, presents a federal

question to be resolved according to federal common law, and has resolved such cases by developing and applying the doctrine of equitable apportionment. Under this doctrine, neither claimant state's law governs, and the waters are apportioned equitably according to a variety of factors. See, Illinois v. City of Milwaukee, 406 U.S. 91, 105 (1972); Nebraska v. Wyoming, 325 U.S. 589 (1945); Hinderlider v. La Plata & Cherry Creek Ditch Co., 304 U.S. 92 (1938); Wyoming v. Colorado, 286 U.S. 494 (1932) and 259 U.S. 419 (1922); Connecticut v. Massachusetts, 282 U.S. 660, 670 (1931); Kansas v. Colorado, supra.

In New Jersey v. New York, 347 U.S. 995 (1954) and 283 U.S. 336 (1931), the Supreme Court applied this doctrine to the apportionment of the waters of the Delaware River. New Jersey in both cases

urged, unsuccessfully, application of the strict rule of the common law under which the River would "come down to it undiminished." 283 U.S. at 342.

Pennsylvania intervened in the cases to protect its own sovereign interests, but the motion of the City of Philadelphia to intervene was denied by the Supreme Court on the principle that "the state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens'." New Jersey v. New York, 345 U.S. 369, 372 (1953), quoting Kentucky v. Indiana, 281 U.S. 163, 173-74 (1930).

In neither Delaware River case, however, did the Supreme Court directly rule on the effect of its Decrees on individual riparian owners. To the extent the subject was considered at all, the Court's

holding is favorable to these plaintiffs:

> "No diversion herein allowed shall constitute a prior appropriation of the waters of the Delaware River or confer any superiority of right upon any party hereto in respect of the use of the waters." New Jersey v. New York, 347 U.S. at 1004.

Furthermore, under the Eleventh Amendment and the principles governing parens patriae suits between states, the rights of these individual plaintiffs could not have been advanced by Pennsylvania in the Delaware River cases against New York.

Parens patriae suits must involve a sovereign or quasi-sovereign interest of the states, rather than a "mere collectivity" of the private interests of their individual citizens. Pennsylvania v. New Jersey, 426 U.S. 660, 665 (1976). See also, Hawaii v. Standard Oil, 405 U.S. 251 (1972); Commonwealth of Pennsylvania

v. Kleppe, 533 F.2d 668 (D.C. Cir. 1976). In equitable apportionment cases in which the plaintiff state has pleaded its own private interest as a riparian, the Court has specifically excluded such interests from consideration. See, e.g., Kansas v. Colorado, 206 U.S. 46, 98 (1907) ("We need not stop to consider what rights such private ownership of property might give."). In addition, any parens patriae suit brought against another state to recover for injury to the property rights of individual citizens would be barred by the Eleventh Amendment. See, New Hampshire v. Louisiana, 108 U.S. 76 (1883).

It is well settled that the individual states may, by legislation or judicial decision, establish or adopt rules of property law which create or enforce riparian rights, and rights in water generally.

"[If the States] choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections." Shively v. Bowlby, 152 U.S. 1, (1894). See also, Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 320 (1973); Fox River Paper Co. v. Railroad Comm'n., 274 U.S. 651, 655 (1926); Port of Seattle v. Oregon & Washington R. R., 255 U.S. 56 (1920); Scott v. Lattig, 227 U.S. 229, 242 (1913); Kansas v. Colorado, 206 U.S. 46, 93-94 (1907); Hardin v. Jordan, 140 U.S. 371, 380 (1891); Hoboken v. Pennsylvania R. R., 124 U.S. 656 (1887); Barney v. Keokuk, 94 U.S. 324 (1876). Most of the original states adopted the common law of England as received and applied in their jurisdiction under colonial rule. See, e.g., Art. 1 § 14 of the New York Constitution of 1938, originally found in Art. 35 of

Schedule No. 1, the Constitution of 1777 and/ § 2 of the Pennsylvania Constitution of 1874.

It is equally clear, however, that insofar as actual diversions of water are concerned, no individual state can bestow on its citizens by its local property law, a right greater than that to which the state itself is equitably entitled.

> "It may be assumed that the right adjudicated by the [Colorado] decree of January 12, 1898 to the Ditch Company is a property right indefeasible so far as concerns the State of Colorado, its citizens, and any other person claiming water rights there. But the Colorado decree could not confer on the Ditch Company rights in excess of Colorado's share of the stream; and its share was only an equitable portion thereof." Hinderlider v. La Plata & Cherry Creek Ditch Co., 304 U.S. 92, 102 (1938).

See also, Wyoming v. Colorado, 286 U.S. 494, 508 (1932); and United States v. Nevada, 412 U.S. 534, 539 (1973).

Relying on these cases, the City

argues that the common law doctrine of riparian rights is abrogated in streams the waters of which have been apportioned by Supreme Court Decree or Interstate Compact, and that, in this instance, the rights of these plaintiffs have been adjudicated with those of Pennsylvania and are thus barred.

As to the first point, it is clear from the cases cited above that riparian rights within a state are purely a matter of that state's concern, generally regulated by local property law, and are not, by that fact alone, destroyed or altered when the Supreme Court applies federal common law to conflicts between the states and apportions the total waters of the stream among the various competing interests. It should be noted that federal common law itself is not synonomous

with the abrogation of riparian rights: "[T]he quality of being riparian, especially to navigable water, may be the land's 'most valuable feature' and is part and parcel of the ownership of the land itself." Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 326 (1973); Hughes v. Washington, 389 U.S. 290, 293 (1967).

To adopt a contrary position would lead to the anomalous result that Pennsylvania landowners on the Delaware have been deprived of their rights, even as against each other. The City's second argument seeks to blunt what could otherwise be seen as a certain inequality, the fact that the City has compensated owners of New York riparian property for the loss of their property rights, and has failed to compensate Pennsylvania riparians for the same loss. The City contends that, by the Court's Decree, New York

State's present total share of the waters of the Delaware is 800 m.g.d., and that the City, in appropriating all of that share for its own uses, is thus bound to compensate New York riparians for their loss of participation in New York's share, but is not bound to compensate Pennsylvania residents, since they continue to enjoy all that they were ever entitled to enjoy -- i.e., Pennsylvania's share.

With this argument the City has proved both too much and too little. Too much, because this position cuts against the City's first argument concerning the applicability of federal common law: if the Supreme Court's Decrees abrogate the common law doctrine of riparian rights, New York riparians, as well as those in Pennsylvania, have no rights for the taking of which compensation must be made.

At the same time, the City's argument falls short of meeting the present situation. Even if we accept for the sake of argument the contention that Pennsylvania riparians on the Delaware are presently enjoying the full volume of water to which they were ever entitled, the fact remains that the City by its dams has materially altered and worsened the remaining waters of the Delaware, that is, has worsened the portions alloted, under the City's arguments, to Pennsylvania, New Jersey and Delaware. As the common law maxim runs: sic utere tuo ut alienum non laedas (property must be used in such a way as not to injury the property of others). As we shall discuss below, the City's works have adversely affected the temperature, flow, stage and quality of the

River. The Supreme Court's Decrees were certainly not intended as licenses for the City to commit such injuries without liability.

Moreover, even that portion of the City's argument relating to the quantity of water must be rejected because the City's diversion of "its" 800 m.g.d. adversely affects the quality of the water allotted to the other states bordering on the Delaware. A diminished volume of water flows in the old bed of the River and the River is at times and in parts turned into a swamp. The City undoubtedly has the right to take its share of the Delaware, but must exercise its right in such a way that the rights of others are not abridged, or alternatively, must compensate for the loss or damage.

It is noteworthy that by the City's own argument, the City has avoided paying

owners of New York property for the full loss of their riparian rights, since some water continues to flow in front of their land. In effect, the City has taken and paid compensation for only part of the value of the riparian rights of New York property owners, and has at the same time trespassed upon the rights of Pennsylvania riparians and refused to pay them anything for their identical loss.

Finally, there is no merit to the City's remaining defenses based on federal apportionment of the Delaware. The Supreme Court's retention of jurisdiction in New Jersey v. New York does not deprive this Court of jurisdiction, since jurisdiction was explicitly retained only over the parties to that case, to enable them to seek a modification of the Court's Decree. 347 U.S. at 1005.

Nor does the Delaware River Basin Compact deprive plaintiffs of their rights. Section 14.19 of that Compact expressly provides:

> "Nothing contained in this compact shall be construed as affecting or intending to affect or in any way to interfere with the law of the respective signatory parties relating to riparian rights."

Injury to Riparian Property on the Delaware

The courts have been called on repeatedly to adjudicate the question of the effect of the City's dams and diversions on the Delaware and its tributaries, and on New York property fronting on the River. In each such case, counsel for the City has argued that the effects of diversion were minimal, or even that they were beneficial. In each case the courts have found against the City on the question, and the City should be barred from re-

litigating the issue here. Consequently, although plaintiffs' evidence at trial independently proved that the City's actions were detrimental to the temperature, stage, flow and quality of the River and to adjacent property, as I so find, this Court will not here repeat at length what has been done exhaustively elsewhere.

The Report of the Special Master appointed by the Supreme Court in 1930 summarizes the voluminous evidence presented to the Master on the effects of the City's proposed diversion of 600 m.g.d. The Master found that "[t]he effect of the New York diversion on the recreational uses of the river will be to cause somewhat more than slight damage, particularly as affecting the reputation of the river as a place of recreational

resort." Id., Finding of Fact No. 37, at 205. The Master accordingly recommended that the City's diversions be limited to 440 m.g.d.

The Supreme Court specifically approved the Master's findings and restricted the City's diversions to 440 m.g.d.:

> "The Master finds that the taking of 600 million gallons daily from the tributaries will not materially affect the River or its sanitary condition, or as a source of municipal water supply, or for industrial uses, or for agriculture, or for the fisheries of shad. The effect upon the use for recreation and upon its reputation in that regard will be somewhat more serious, as will be the effect of increased salinity of the River upon the oyster fisheries. The total is found to be greater than New Jersey ought to bear, but the damage can be removed by reducing the draft of New York to 440 million gallons daily ...." 283 U.S. at 345.

The Special Master appointed by the Court in 1954 refrained from making

findings of fact, and merely recommended that the City's allotment be increased to its present 800 m.g.d. The Master noted, however, that "Pennsylvania, New Jersey and Delaware, while not showing any present damage, have adduced extensive proofs to the effect that the New York plan will cause them substantial damage in the future and strongly urge that they be given protection against that possibility if the New York plan be now authorized." Report of the Special Master at 107 (filed May 27, 1954).

In addition to these findings made by Special Masters appointed by the Supreme Court, Commissioners appointed by the New York Supreme Court pursuant to Title K of the Administrative Code of the City of New York have also considered and made findings on the condition of the Dela-

ware River from Hancock to Skinners Falls, New York, that is, on the condition of the River as it flows in front of the property of all of these plaintiffs here, except that of Van Loan/Elwood. In each case, the City argued that its regulation of the flow of the River was beneficial, or only minimally harmful, and in each case different boards of Commissioners have found de novo that the City's diversions had adversely and permanently affected the River. Each of these determinations in turn has been confirmed by a Justice of the New York Supreme Court and by the Appellate Division. See, e.g., In re Maguire (Wingert), unpublished opinion of Conway, J., dated October 16, 1973, aff'd., 48 App.Div.2d 958 (3d Dept.), motion for leave to appeal denied, 37 N.Y.2d 712 (1975); In re Maguire

(McBride), unpublished opinion of Conway, J., dated April 16, 1971, aff'd., 38 App. Div.2d 777 (3d Dept. 1972).

The issue in those cases is precisely the issue here. In In re Maguire (Wingert), for example, the Court stated:

> "There was considerable testimony in this case as to the damage to such recreational activities as fishing and swimming in the river as the result of diversion of the Delaware by New York City. In Matter of Ford (City of New York), 18 A.D.2d 855, 236 N.Y.S.2d 591, 593, also involving diversion of the Delaware by New York City, this court found that it was 'abundantly clear that a very large part of the value before the taking was in fact attributable to the recreational facilities afforded by the river and subsequently in large part destroyed' by the diversion of the waters. The expert testimony in these cases ... as to what the value of the properties would have been was properly received and considered by the commissioners as an aid to their determination of the loss to respondents, including that occasioned by the damage to the river as a recreational area.

> We find that the awards in all these cases rested upon sufficient evidence in the record ...." 48 App.Div.2d at 959.

The City objects to the application of collateral estoppel here because it claims that the issues involved in the Title K proceedings and in these cases are different, and that the standard of proof applicable in Title K proceedings is different from the standard before this Court. Both these contentions must be rejected.

The issue here, harm caused to the Delaware River by the City's actions in impounding and diverting water, is precisely the issue involved in the Title K proceedings, and decision on that question was essential to the determinations in each of those proceedings.

Secondly, under Title K the court-appointed Commissioners are a quasi-

judicial tribunal, whose powers include the right to issue subpoenas, administer oaths, take testimony, and make findings of fact. Since 1964, the scope of the Appellate Division's power to review the findings of these Commissioners has included the power to "re-evaluate the record and make its own findings" in order to modify or reject an award if necessary to conform it to the evidence presented. In re Ford (Siska), 22 N.Y.2d 834, 837 (1968). See also, In re Ford, 35 App.Div.2d 43, 46 (3d Dept. 1970). This power to review the findings of the Commissioners effectively disposes of the City's main objection to the application of the principle of collateral estoppel in this case.

The City has had more than a fair opportunity to litigate the question of damage to the Delaware River and should

not be allowed to re-litigate it here. Mutuality of estoppel is no longer a prerequisite for the application of collateral estoppel. See, Shore v. Parklane Hosiery Co., Inc., 565 F.2d 815 (2d Cir. 1977); Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir.), cert. denied 377 U.S. 934 (1964). The Shore case, supra, applied a federal rule of estoppel by judgment in a case arising under the federal securities laws. We regard the matter as procedural, not substantive, and therefore not limited by Erie principles. In any event, New York seems no longer to require mutuality. See, Schwartz v. Public Administrator, 24 N.Y.2d 65 (1969).

In addition to these judicial findings, the New York Legislature has also made its own findings in connection with enactment of Chapter 888 of the Laws of 1976. The New York Legislature found

that reservoir releases "have damaged the recreational uses, such as trout fishing and canoeing" below the City's dams. N.Y. Environmental Conservation Law § 15-0801. While these findings are not conclusive upon this Court, and may be rebutted by contrary evidence, they are entitled to some weight. See, e.g., Chastleton Corp. v. Sinclair, 264 U.S. 543, 547 (1924).

In this case, these legislative findings have not been controverted. Indeed, these findings have been established independently by the evidence introduced at trial by the plaintiffs and their expert witnesses.

Defendant's Ex. C, introduced at the trial, graphically indicates the scope of the City's manipulation of the natural flow of the Delaware. It shows that in a typical year, 1971, for example, the City

diverted for its own uses and stored some 28% (200 billion gallons) of the flow and manipulated by its releases and spills a further 18.6% (150 billion gallons) as measured at Callicoon, New York. The amount annually diverted by the City is approximately 88% of the full amount allowed by the Supreme Court's Decree.

The River Master's Annual Reports show the details of this manipulation. In 1969 for example, the City released only the minimum conservation releases for 14 consecutive days in June, and then in July released approximately a billion gallons a day for 11 consecutive days. From the end of July until mid-August, only conservation releases were made. At the end of August, there again followed another extended period of releases averaging one billion gallons per day. This same general

pattern has been followed in succeeding years.

On the trial of this action, the City introduced the testimony of Mr. Stanton, an engineer and acting director of the City's Bureau of Claims, to show that extreme low flows after the diversion were, on a monthly average, considerably higher than prediversion low flows. I find this to be true, but such evidence does not rebut or negate the effect of the plaintiffs' evidence of enormous fluctuations on a daily basis.

Mr. Paul E. Blomquist, an expert called by the City, testified as follows on the fluctuation in flow as it affected one of the properties in this case, that of Van Loan/Elwood:

> A. "With regard to Van Loan, which is on the West Branch of the Delaware River, subject principally to the larger releases

when they are necessary, from Cannonsville Reservoir, there would be a pronounced increase in the flow past that property under conditions of high release in the summer months ....

Q. Mr. Blomquist, if you will pardon an interruption, you said 'an increased flow.' Increased from what?

A. Above what would have passed by absent the reservoir. As a matter of fact, substantially increased flows because of the operating policy of the City of New York at this time.

Now, during the years when the run-off is high and the reservoir is being recharged, then the river below the dam would be getting less than the normal or the natural flow; and as a consequence of that, there would be less flow in the river past Van Loan than there would have been absent the reservoir.

Now, this is a condition which is brought about by all of this. In weather conditions, with the dry weather, a drought period, there are extended or high releases from Cannonsville, which augment the flow at Van Loan or at any

point between Van Loan and the dam; and then, when the flow at Montague, where no releases are necessary, then there is an effect of withholding, a short reduction of flow."
(Transcript, pp. 59-60.)

The plaintiffs' proof at trial showed the adverse effect these fluctuations in volume, stage and flow had on canoeing and other water recreations. One witness testified that he had seen an automobile driven across the Delaware above the Canfield property during a period of low flow.

An obvious effect of these great fluctuations in volume has been an enormous range in summer water temperatures in the River. In every body of deep, still water, such as the Cannonsville and Pepacton Reservoirs, thermal stratification occurs, with the thermocline usually at about 25 feet. Below that depth, in the

hypolimnion, water temperatures average 40° F. Because both of these Reservoirs release water into the River from spillways in the bottom of the dams, water is released in normal periods at about 40 degrees.

The effect of these cold releases is more apparent, of course, the nearer one approaches the source of the releases, and so is most apparent at the Van Loan/ Elwood property which is approximately five miles above the confluence of the East and West Branches. However, these effects are still felt at the Canfield property which is some 40 miles below these dams.

A correlation of summer water temperatures, as measured at Callicoon, New York (situated between the Canfield and Gregory properties) and water releases by the City shows that when the releases were

minimal, water temperatures closely approximated air temperatures and averaged in the 70's Farenheit. When the City's releases approached or exceeded one billion gallons a day, the water temperature dropped into the low 60's or upper 50's. These figures, derived from exhibits prepared by the City, are confirmed by plaintiffs' Ex. 24, an official report prepared by the United States Geological Survey in 1964. The report is properly admissible here under Rule 803(8), F.R.Evid.

Each of the plaintiffs testifying at the trial mentioned the immediate and adverse effect such fluctuations in temperature had on swimming, but the more serious consequences were those affecting fisheries in the Delaware.

Before the diversion of the head-

waters of the Delaware, the River was considered a warm-water stream, with summer temperatures averaging in the 70's or low 80's. At that time, the major fishery in the main body of the River was for small mouth bass and walleyed pike, but there was some fishing for trout near the spring holes and hear [sic] the mouths of tributaries.

Mr. Edward C. Raney, an icthyologist, testified for plaintiffs on the deleterious effects of the City's diversion of water from the Delaware. Briefly, he testified, and I find, that the City's dams act to prevent normal spring freshets which formerly cleansed the River of slime and algae and of accumulated rubble at the mouths of tributaries. The consequence of the general stagnation of the River and the growth of slime along it has been a general increase in mosquitos and

insects on riparian property. The consequence of the formation of deltas at the mouths of tributaries to the Delaware has been a marked change in the normal habits of fish in the River and their exclusion in some degree from the tributaries.

Low winter flows in the River have allowed ice to form to the bottom of the stream in many places, destroying the aquatic organisms on which fish feed.

The fluctuations in temperature caused by the City's diversions have almost totally destroyed the warm-water fisheries in the River. The optimum temperature for warm-water fish is between 70° and 80° F. and, as mentioned above, the City's releases have frequently acted to reduce the summer water temperatures for prolonged periods to the low 60's or upper 50's. In addition, high releases

of water during the spawning season have driven bass from their nests and prevented the propagation of young.

The same fluctuation in temperature and flow has in large measure blocked efforts to turn the River into a cold-water fishery for trout: low flows from the City's dams allow the temperature of the River to approach air temperature, which, in the summer months, is usually in the range from 70° to 80° F. Unless trout can hide in a cold spring or inlet until the next City release, they will be subjected to trauma or death.

Mr. Raney's observation of fishing on the Delaware were all made before 1965, but the conditions upon which he based his opinions still exist and are largely unchanged. In addition, his opinions were borne out by those of Harry

Darby and Harry Phillips, both active anglers with more recent experience of the River.

On the trial of this action, plaintiffs sought to have admitted into evidence a report, issued by the New York State Department of Environmental Conservation, entitled "Proposed Alternative Releases from New York City Reservoirs in the Upper Delaware River Basin" (1974). The factual material contained in the report is clearly admissible, see Rule 803(8)(C), F.R.Evid., N.Y. Environ. Conserv. Law § 3-0301, and Williamson v. Union Oil Co. of California, 125 F.Supp. 570 (D. Colo. 1954). This report generally reinforces plaintiffs' contentions concerning the precarious position of cold-water fisheries in the Delaware.

A more serious problem with the

report, however, is one that has only arisen since 1976 when the City began to make increased daily releases under the new Environmental Conservation Law. The opinions contained in the report are to the effect that increased flows would in large measure serve to stabilize the trout fisheries in the Delaware. While these opinions as such may not be admissible, this Court may take judicial notice of the elementary laws of physics and draw its own conclusions from them and from evidence already properly admitted. Accordingly, I find that even if the new statutory minimum flow were to be maintained by the City (a condition which will be no means necessarily occur), it would not be sufficient to repair the damage done to the River by the City's diversions, even as concerns the trout

fisheries: spring freshets would still be lacking in the River, deltas would still form at the mouths of tributaries, blocking trout seeking refuge in the cooler waters, and the massive fluctuations in temperature, flow and velocity, produced by the City's meeting the Montague formula would still occur.

The plaintiffs have not only proved that the River has been harmed, and with it their properties, but they have also established that the harm is permanent, in the sense that it is likely to continue while the City's dams and reservoirs endure. As discussed above, the new regulations enacted under the Environmental Conservation Law in no way detract from this conclusion.

The evidence introduced by the City on the condition of the Delaware

River fisheries does not rebut the testimony of plaintiffs and their witnesses. One of the City's biologists only grudgingly admitted that the City's diversions and dams has caused any damage to the fishing, a position that is scarcely tenable. A second expert, Mr. Grim, admitted that the River had been adversely affected, but differed with plaintiffs only on the question of degree.

Necessary and Proper Parties

The City has argued that this action must be dismissed since certain parties, notably the Commonwealth of Pennsylvania and the State of New York, are absent and are necessary to the resolution of the controversy. This argument is without merit. See, Brooks v. United States, 119 F.2d 636, 643 (9th Cir. 1941). This Court is neither apportioning the

waters of the Delaware nor questioning the validity of prior apportionments. All that is in issue here is a trespass to a private property right protected both by the property law of New York and Pennsylvania, as well as the Fourteenth Amendment. And the sole trespasser is the City of New York.

The City has also argued that the Lake and Van Loan/Elwood claims must be dismissed because those plaintiffs had sold their properties long before filing a Notice of Claim, and consequently had been out of possession at all times during which an actionable trespass occurred.

Generally, in Pennsylvania and New York, for a plaintiff to recover damages for trespass to property, he must have possession of the land, or the right to immediate possession of it, at the time of the injury. Nevertheless, the right

to recover damages for a trespass or a taking is a personal one, assignable or retainable by a vendor. See, e.g., In re Appointing Viewers to Assess Damages, 409 Pa. 290, 186 A.2d 20 (1962); McFadden v. Johnson, 72 Pa. 335 (1872). And this is so whether the cause of action has already accrued when assigned, or is yet to arise. In the analogous situation where a grantor reserves, in a deed, damages with respect to the existing and future condemnation of land, the Pennsylvania courts have upheld the grantor's rights. See, e.g., Chapleski v. Commonwealth of Pennsylvania, Dept. of Highways, 5 Pa. Commonwealth 482, 291 A.2d 360 (1972).

Both New York and Pennsylvania favor free alienability of interests in land. Having accepted a deed with such rights reserved and excluded, subsequent

transferees of the damaged parcels would be hard put to make any claim against the City, and accordingly there is no way in which the City would be likely to pay twice. If the City's arguments with respect to lack of standing were to be accepted here, no one would be able to sue to recover for a clearly proved trespass: these plaintiffs would be barred because they are out of possession, while the vendees in possession would be barred by the exclusions and reservations in their deeds.

I find and conclude that both these plaintiffs reserved in their deeds of conveyance all rights against the City of New York and are entitled to bring their actions on the theory that they are suing to enforce retained rights, or alternatively, on the theory that acceptance of the respective contracts of sale and deeds

constituted an equitable assignment by the vendees to these plaintiffs of their possessory right of action.

Finally, George Elwood, as Administrator d.b.n., c.t.a., is the proper party to bring this action for the benefit of the Van Loan Estate. His powers as Administrator included the power to sell the property. This he did, expressly retaining in the deed "rights acquired and to be acquired" against the City.

Mr. Elwood's account to the Orphan's Court of Wayne County, Pennsylvania, set forth in detail his activities in pursuing the rights of the Estate against the City of New York, and the account was approved by the President Judge of that Court on September 11, 1967.

Essentially, Mr. Elwood's actions in this litigation are authorized as a necessary adjunct of his testamentary

power to sell the real property of the Estate on reasonable terms, and to retain and enforce rights already accrued or to arise in favor of the decedent's ownership, against the City.

Damages

On the trial of this action both parties presented evidence on the value of plaintiffs' properties and also presented appraisals made by their respective experts. In addition, on June 27, 1975, in the company of counsel, I made a personal inspection of all of the damaged properties and several other properties used as comparables in the appraisals.

In Elwood v. City of New York, an unpublished opinion dated March 27, 1973, Judge Pierce of this Court held with regard to one of the plaintiffs here that the "initial period of the claim would be

limited ... to encompass trespass only up to 90 days before the notice of claim was filed." Id. at 4. This is the proper standard to be used in computing damages in all these cases. See also, Hackensack Water Co. v. Village of Nyack, 289 F.Supp. 671 (S.D.N.Y. 1968).

The City argues from this ruling that four of the five plaintiffs here are barred from recovery because in each of their cases the date of the sworn appraisal submitted was more than 90 days before the filing of a Notice of Claim with the City. All these appraisals were made by Mr. Rodman Fellows, who uniformly used October 20, 1971 as the date for appraisal. Mr. Fellows' appraisals were properly admitted and form the basis for his direct testimony on the value of the plaintiffs' properties given at trial. Moreover, to

the extent plaintiffs' appraisals are credible for the period they claim to reflect, they are, in the light of the generally upward trend in real estate prices proved on the trial, a minimum estimate of damages, valid for later periods for which damages are properly recoverable. Accordingly, this date variance is not a basis for dismissal. Damages will be determined by the Court based on the entire record, and as of the date ninety days prior to filing a Notice of Claim, hereinafter the "damage date." Plaintiffs have proved a continuing and permanent trespass by the City with respect to their riparian rights. In a continuing trespass, "each new day establishes the cause anew." Bloss v. Village of Canastota, 35 Misc.2d 829, 831, 232 N.Y.S.2d 166, 168 (Sup. Ct. Mad. Co.

1962). See, Gregory v. City of New York, 346 F.Supp. 140, 144 (S.D.N.Y. 1972).

Consequently, these plaintiffs, as we held in Gregory, cannot be barred forever by the "late" filing of their Notices of Claim; nor are they prevented by the date of filing of their Notices of Claim, from presenting estimates of value valid for any date within the period extending from 90 days prior to filing their Notices to the time of trial. We answer now, in the negative, the question posed in Gregory, supra, at 145:

> "If, as appears likely, lump-sum damages are assessed to cover the diversion from inception into perpetuity, or near perpetuity measured by the future life of the dams, will such damages be lessened materially because the first five or six years of such permanent diversions are excluded?"

Plaintiffs' motions to strike the appraisals of Mr. Walter Donnaruma, on the

ground that they lack detailed adjustments for time and location, are denied. The appraisals are admissible within the philosophy of Rule 401, F.R.Evid., regarded as declaratory of existing law in this Court. In any event, adequate notice and opportunity to demand such adjustments prior to trial existed, and were not availed of.

There is another difficulty with the Donnaruma appraisals which goes only to their weight and significance. They are based on the clearly false premise that no adverse consequences whatsoever were caused to riparian property on the Delaware by the construction and operation of the Cannonsville and Pepacton Reservoirs. Consistent with that view, all of Mr. Donnaruma's comparable "before" values comprised riparian properties on the Delaware, which themselves had been

affected by the City's diversion. This approach was rejected in In re Maguire (Wingert), 48 App.Div.2d 958 (3d Dept. 1975), in which the City relied on similar appraisals by Mr. Donnaruma, and it is rejected here.

The proper method of appraisal and the manner in which damages must be computed is based on the difference between the market value of the damaged parcel, as subjected to the permanent trespass on the damage date, and the market value of the parcel as it would have been on that date, but for the trespass.

As stated in In re Maguire (Wingert), supra, at 958-59:

> "The primary contention of appellants is that respondents' expert, in all the cases excepting Phillips', by basing his estimation of damages on the value that the subject properties would have had but for the loss of riparian rights, rather than upon the actual

> decrease in value, submitted proof which was speculative and inadequate. The permissibility of introducing expert testimony with respect to both the present value of the premises with the water diverted and also as to what the present value would be had there been no diversion was upheld by this court in Gallagher v. Kingston Water Co. (25 App Div 82, aff'd 164 NY 602). .... 'The expert *** necessarily has to consider both benefits and injuries and balance the account--which is the very thing the jury have to do. The majority of the court thought it better that all the conditions affecting values be shown, and thereupon the court or jury should determine. In the case before us there are no benefits to be considered; it is a simple question of value, with or without the water *** Experts know better than the non-expert' (Gallagher v. Kingston Water Co., supra. pp 85, 86). We find no case modifying the basic holding in Gallagher and the reasoning therein is applicable to the instant situation. The takings herein have not brought benefits to respondents' properties and we are presented with a simple question of value upon which expert testimony would be most useful. There was considerable testimony in this case as to the damage to such recreational activities as

> fishing and swimming in the river as the result of diversion of the Delaware by New York City. In Matter of Ford (City of New York) (18 AD2d 855, 856), also involving diversion of the Delaware by New York City, this court found that it was 'abundantly clear that a very large part of the value before the taking was in fact attributable to the recreational facilities afforded by the river and subsequently in large part destroyed' by the diversion of the waters. The expert testimony in these cases (excepting Phillips') as to what the value of the properties would have been was properly received and considered by the commissioners as an aid to their determination of the loss to respondents, including that occasioned by the damage to the river as a recreational area. We find that the awards in all of these cases rested upon sufficient evidence in the record and fell within the range of expert testimony with regard to damages and values."

Cf., Rider v. York Haven Water Co., 251 Pa. 18 (1915); Miller v. Windsor Water Co., 148 Pa. 429 (1892).

Mr. Fellows' appraisals follow this approach and include very detailed adjustments made for time of sale and size of

parcel. None of the comparable sales is remote in time from the valuation date. Each of Mr. Fellows' "before" sales was a sale of recreational land fronting on water not affected by the diversion of the Delaware; his "after" sales were sales of Delaware River properties, most notably the 1966 sale of the Van Loan property on the West Branch.

The City has moved after trial to strike plaintiffs' appraisals on the ground that Mr. Fellows relied on plaintiffs' Ex. 25 in making them. This motion is denied. Exhibit 25 was properly admitted on the trial for its factual content, which would have been properly relied on by Mr. Fellows in making his appraisals. There is no evidence that Mr. Fellows actually relied on opinions in Ex. 25 in preparing his reports. To

the extent that his appraisals do reflect the opinions expressed in that report, they are, in the light of subsequent events, favorable to the City. Reliance on the opinions of others is not uncommon on the part of an expert witness, and is now expressly authorized by Rule 703, F.R.Evid.

Defendant's remaining objections to the Fellows' appraisals are equally without merit. It is of no significance that Fellows chose to call the date chosen for evaluation the "date of condemnation." The reality sought to be expressed, not the expression chosen, is the essential factor here, and Mr. Fellows, as discussed above, used the correct formula in estimating damages.

Finally, Mr. Fellows' concession that the prices of all these parcels had been rising at about 5% per year since the early 1970's is not inconsistent with his

assertion that damage has occurred. Both parties agree, and this Court finds, that the highest and best use of these properties is for recreation. Damages are to be based on the highest and best use of the property before the trespass. See, Snyder v. Pennsylvania, 412 Pa. 15, 192 A.2d 650 (1963).

Van Loan/Elwood. Mr. Fellows estimated the "before" or hypothetical value of the Van Loan/Elwood property absent the trespass as of October 20, 1971, at $160,500.00, and its value "after", that is, as it stood on October 20, 1971, at $22,000.00. The difference between these amounts is his expert opinion concerning damages.

The Delaware River Valley is accessible and is near large population centers. The beauty of the climate and the outstand-

ing attractiveness for recreational purposes of the Delaware River Valley riparian properties cannot be denied.

As noted, the Court inspected this and the properties discussed below. The Van Loan/Elwood property consists of approximately 123.5 acres of land with 2,720 feet of River frontage. Ball's Creek flows through the property towards the River, and part of the property faces Pine Island in the River, premises owned by others. The channel between the Van Loan/Elwood property and Pine Island is not the main flow of the River. Within the tract, but excluded from the ownership, is the small rural cemetery belonging to the now defunct community of Ball's Eddy, and an adjacent structure not owned by Van Loan/Elwood. See map included in Fellows' Appraisal.

The Court accepts for purposes of the damage formula, the value of $22,000.00 after damages, computed as of October 20, 1971, and adjusts that figure, for time, by adding 5.8%. The proper date for valuation of this parcel is January 25, 1973. The upward trend of acreage prices in the Delaware Valley and on comparable unregulated streams for recreational land has increased at about 5% per year.

The Court regards Mr. Fellows' appraised "before" market value of $160,500.00 as somewhat excessive. Comparable sales Nos. 4 and 5 in the Van Loan/Elwood appraisal are of very slight usefulness, because the Van Loan/Elwood parcel must be regarded as an acreage situation of which the highest and best use contemplates subdivision, and a discount for size. The difficulty with the analysis of the

other comparables is that they each include substantial adjustments for "enhancement" due to perceived differences in topography and utility. Some of these points of enhancement lie to an extent in the eye of the beholder, and cannot be substantiated by market data. Placing reasonable limitations on such largely subjective enhancements, the comparable acreage sales would appear to indicate a market value adjusted for time, of about $800.00 per acre for the Van Loan/Elwood acreage. This is consistent with reality, as confirmed by my inspection of the premises, and I find that as of January 25, 1973, the Van Loan/Elwood property would have had a value without the existence of the continuing trespass as follows:

Buildings	$ 6,877.00
Building site (see p. 28 of Fellows' appraisal).....	2,116.00
Acreage (121.6)	97,280.00
Total	$106,273.00
Less "After" Value	23,276.00
TOTAL DAMAGES	$ 82,997.00

Plaintiff George Elwood, as Administrator, etc., shall recover $82,997.00, together with pre-judgment interest from January 25, 1973 to the date of the judgment, and his costs to be taxed, including the additional allowances for expenses and disbursements authorized by § K51-44.0 of the Administrative Code of the City of New York.

As was observed by Judge Tenney (supra, p. 13), the standard for fixing damages for these plaintiffs is the same as the measure of damages being employed in proceedings by the City with respect to Damage Parcels on the other [New York]

side of the River, opposite plaintiffs' properties. There, in proceedings under Title K of the Administrative Code of the City of New York, the City has condemned the riparian rights to the extent infringed upon by its dams. In reality, the proceedings here are, as Judge Tenney recognized, tantamount to condemnation. Accordingly the interest of justice in these cases demands that these plaintiffs, although proceeding technically on the theory of a permanent and continuous trespass or tort, should be treated as nearly as possible in all respects equally with persons similarly situated owning riparian land on the New York side of the River. These latter persons receive interest on their awards from the date of "taking," at the rate of 6% per annum, notwithstanding the general limitation on interest

imposed by the State of New York with respect to claims against municipal corporations (3%) found in § 3-a of the New York General Municipal Law. Pre-judgment interest allowed under current economic conditions at an annual rate of less than 6% is a deprivation of property and an obvious injustice. Accordingly, Elwood's judgment, and the other judgments to be entered herein will bear pre-judgment interest at the rate of 6% per annum from the damage date until paid. See generally, Hartman v. City of New York, 29 Misc.2d 578 (Sup.Ct. Sullivan Co. 1961).

In this case and with respect to the four other parcels, the Court will stay enforcement of judgment pending appellate finality, and pending also compliance with § 394a-2.0 of the Administrative Code of the City of New York. In

addition, as a condition of payment, the City may require from Elwood and the other plaintiffs, releases or equivalent instruments in proper form which may be recorded in the land records of Wayne County, Pennsylvania so as to protect against any future claims, and give notice in the chain of title to persons hereafter acquiring any interest in the property.

Badgley. The Badgley property presents vivid evidence of the limitations on recreational use of the River occurring as a result of the damage described before. Here we have a parcel primarily used for recreation, having river frontage on the Delaware River, on which the owners have found it necessary to install a swimming pool. In addition to the swimming pool, this property, which consists of approximately two acres with 530 feet of River

frontage, is improved with a large residence near the highway, also used as a retail antique shop. The date for fixing damages for the Badgley property is February 24, 1972. Since the Fellows' appraisal is computed as of October 20, 1971, an upward adjustment for time amounting to 1.7% increment is required.

The Court finds that the value "after" the trespass is $42,500.00. The analysis by Mr. Fellows of the "before" value reached a total as of October, 1971 of $71,000.00. The comparable sales have been analyzed in accordance with generally accepted principles affecting the appraisal of real property, but here again, as in Van Loan/Elwood, there seems to be a subjective element which may be regarded as too optimistic. The Court, based on all of the evidence in this case, and relying also on its own inspection of the

premises, believes that the value without regard to the taking should be, and is, fixed in the amount of $65,000.00. This leads to a damage award in favor of Lillian Badgley (now Dixon) of $22,500.00 with pre-judgment interest from February 24, 1972 to the date of the judgment at the rate of 6% per annum, and costs and disbursements to be taxed.

Lake. The Lake property consists of approximately 15 acres with 600 feet of River frontage, intersected by Spring Run Creek on the northern section of the property. The property also has a small piece of frontage at its southerly inland corner on Equinunk Creek. These creeks are tributaries of the Delaware River. A building site improved by a residence occupies approximately three acres of the land. There is also an abandoned schoolhouse on

the property, an abandoned church building used for storage, and several small sheds. The damage date for the Lake parcel is February 23, 1972. Here again, the appraisal is based on October 20, 1971, and an upward adjustment of 1.7% appears appropriate.

The appraisal submitted by the City as of February 22, 1972 is $23,500.00. A consideration of the analysis by Mr. Donnaruma of the Lake property, and the Court's inspection thereof, indicates that the valuation of $18,800.00 as of October 20, 1971 is unduly low for this parcel, and the Court will adopt the "after" figure of $23,500.00.

The value before is fixed at $34,675.00, resulting in a damage award of $11,175.00, together with interest at 6% per annum from February 23, 1972, with

costs and disbursements to be taxed.

Gregory. Gregory's property consists of 89 acres of land with 795 feet of Delaware River frontage. There is a residence separated from the River by a town highway. That part of the premises west of the town road has a commanding view of the valley and fields which front on the River.

Beginning in about 1964, Gregory successfully sold Riverfront lots to approximately ten purchasers. Most of these lots are relatively small, and are itemized and described in Mr. Fellows' appraisal. The damage date for Gregory is February 25, 1972. Again, an upward adjustment of 1.7% is necessary with respect to the Fellows appraisal. The Court finds that the property value after the damage date is $68,000.00. There is little sub-

stantial difference between the appraisers on this point.

For his appraisal before the damage date, Mr. Fellows valued 88 acres of recreational land at $900.00 per acre average price. This value is somewhat high, because of the fact that some of the land is rather remote from the River and separated by a town highway. It would seem that the best of the Gregory Riverfront property has already been sold off in small parcels. A value of $850.00 per acre as of February 25, 1972 would seem more in keeping with reality. This leads to the following revision of the "before" values as set forth on p. 28 of Mr. Fellows' appraisal and adjusted for time by the Court:

88 Acres of recreational land	$ 74,800.00
Building site and land improvements	4,095.00
Residence	18,300.00
Barn	1,000.00
Garage	500.00
Total	$ 98,695.00
Less "After" Value	68,000.00
TOTAL DAMAGES	$30,695.00

The damage award for the Gregory parcel is fixed at $30,695.00, together with interest at 6% per annum from February 25, 1972, with costs and disbursements to be taxed.

Canfield. The Canfield property is probably the most valuable of the parcels in this case. It consists of approximately 166 acres, having approximately 6,700 feet of frontage on a bend in the Delaware

River on the Pennsylvania side between Callicoon, New York and Skinner's Falls, New York. There is a large island in the middle of the River, not part of the subject property. As the most downstream parcel, it enjoys a greater depth and flow of water than those parcels further upstream. The downstream end of the property is bounded by Schoolhouse Creek, a tributary of the Delaware. Typography of the land and configuration of the River at Canfield's property combine to give this parcel the greatest "river influence," i.e., ratio of frontage to subdividable acreage, of any of the parcels.

The open land was at the time of trial being used by a tenant for agricultural purposes, principally corn and some vegetable gardening. There is an obsolete barn which is not being used.

With respect to this parcel, the correct damage date is July 23, 1971. The City appraiser, Mr. Walter Donnaruma appraised the property at $160,000.00 on July 20, 1971 without regard to any riparian damage, which he found to be minimal.

The best evidence of value before damage in this case is found in Mr. Fellows' appraisal. Mr. Fellows' figures for this property are regarded as on the conservative side. He found an acreage value of $900.00 per unit average, or a total value before diversion of $149,400.00, and an after value of approximately $300.00 per acre, giving rise to damages of $99,600.00. The Court inspected this parcel also. The damages found by Fellows of $99,600.00 are supported by credible testimony. The Court believes that on this parcel, Fellows is low, both as to his

"before" value, and his value "after" the damage, but that the total net damage found is within the realm of reason, and indeed, conservative. In any event, these figures represent the opinion of a qualified and credible expert, there is no credible contrary evidence in the case, and the net amount is borne out by the Court's inspection.

The damage award for the Canfield property is fixed at $99,600.00, together with interest at 6% per annum from July 23, 1971, with costs and disbursements to be taxed.

Conclusion

The foregoing, together with the conclusions of law expressed in all prior decisions made in any of these consolidated actions to the extent not inconsistent herewith, taken together, constitute

the Court's findings of fact and conclusions of law, pursuant to Rule 52, F.R.Civ. P.

The Court is filing five separate judgments simultaneously herewith, each of which is stayed as hereinbefore set forth. Counsel for plaintiffs are directed to tax their costs before the Clerk within thirty (30) days, on not less than five (5) days notice, or upon waiver of notice.

Dated: New York, New York
March 31, 1978

Charles L. Brieant
U. S. D. J.

F O O T N O T E S

1. In his decision, Judge McLean specifically rejected the City's defense that the Van Loan action was barred by the Supreme Court's decision in New Jersey v. New York, 347 U.S. 995 (1954), discussed in the text, pp. 14-21:

> "[T]hat action, it is true, involved the right of New York to divert waters of the Delaware River by the construction of dams and reservoirs, including the Cannonsville Reservoir, but the action did not involve the rights of individual property owners, and the Supreme Court's decree did not touch that question or purport to exclude it from consideration by the District Court in a proper case." Id. at 4.

2. Another case involving Pennsylvania riparian land on the Delaware River situated similarly to the lands of the plaintiffs here and in which similar claims were pleaded has been tried.

In a Decision dated August 1, 1972, Judge Bonsal held that the plaintiff in Dempsey v. City of New York, 66 Civ. 2153, had failed to prove his case. Dempsey was proceeding pro se on the theory that he had failed to re-open his resort hotel on the Delaware River because of the City's diversion of the River. The Court held at p. 5 of its Decision that:

> "[a] careful review of the evidence satisfies the court that the plaintiff's uncorroborated testimony has failed to prove by a fair preponderance of the evidence that he was unable to use his property as a hotel and restaurant because of the diversion of water by the City. This disposition makes it unnecessary to consider the several defenses interposed by the City."

3. Title K, Chapter 51 of the Administrative Code of the City of New York, known as the Water Supply Act, created

a Board, consisting of four Commissioners, to supervise and ensure the City's continued supply of fresh water. The Act provides for compensation to be paid land owners in New York whose property is taken outright for reservoir and associated purposes (K51-11.0). It also provides for compensation for owners whose property is "directly or indirectly decreased in value" (K51-44.0), as a result of the City's efforts to obtain water. Under this latter provision, substantial awards have been paid to riparians on the Neversink and Delaware Rivers, among others. See, e.g., In re Maguire (Wingert), 48 App.Div.2d 958 (3d Dept. 1975), leave to appeal denied, 37 N.Y.2d 712 (1976); In re Ford, 35 App.Div.2d 626 (3d Dept. 1970); In re

Ford (Luth), 18 App.Div.2d 855 (3d Dept. 1963). In Gregory v. City of New York, 346 F.Supp. 140 (S.D.N.Y. 1972), this Court held that procedures under Title K were not available to riparians situated outside of New York State.

4. The deed of conveyance, Ex. 48, recites that "the petitioner (Wayne County Savings Bank) believed the sum a full and fair price for the said premises and more than could be realized at a public sale; that the petitioner believed it to be to the interests and advantage of the said minor that the said premises be sold for the price above mentioned."

5. Presumably, such failure was justified by immediate and overwhelming

public necessity. No penal sanctions were imposed.

6. Riparian owners maintaining the electric generating dams on the Mongaup River and at Lake Wallenpaupack on the Lackawaxen River are not engaging in unreasonable diversion in violation of the riparian rights of downstream owners. They are merely regulating the flow in the stream in an unnatural fashion, dependent on their power demands; the more electricity they generate at their locations during a given time period, the greater will be the amount of impounded waters released. It is ordinarily considered that the actions of the owner of a dam who makes reasonable use of the waters of a stream in the operation of saw

mills, grist mills, etc., without diverting water out of the watershed, are not actionable at the instance of the downstream owner. See, e.g., Pierson v. Speyer, 178 N.Y. 270 (1904).

7. This is confirmed by a Memorandum filed in the Supreme Court by then Solicitor General Bork in 1976, pursuant to a request by the Clerk of that Court for information on the possible effects on the 1954 Decree of N.Y. Environ. Cons. L. § 15-0803, et seq. (July 28, 1976), concerning Regulation of Reservoir Releases. "For greater convenience in its operation, and because of the higher quality water in the Neversink and Pepacton Reservoirs, the city has taken the major portion of its water for city supply from those reservoirs and made the major

portions of the downstream releases required under the decree from the Cannonville [sic] Reservoir." Memorandum at 2.

APPENDIX B

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - -X

LLOYD F. CANFIELD and ELOISE L. CANFIELD, : 71 Civ. 5568-CLB

Plaintiffs, :

-against- : JUDGMENT

THE CITY OF NEW YORK, : #78,695

Defendant. :

- - - - - - - - - - - - - - - - - -X

Upon the Findings and Conclusions after trial filed simultaneously herewith, and on all prior papers and proceedings, it is

ADJUDGED, that plaintiffs, LLOYD F. CANFIELD and ELOISE L. CANFIELD, recover of the defendant CITY OF NEW YORK, a municipal corporation of the State of New York, the sum of $99,600.00, together with pre-judgment interest thereon amounting to $39,972.000, making a total of $139,572.00, and costs to be taxed, and interest thereon at the rate of 6% per annum from the date of this Judgment untill the date of payment; and it is further

ORDERED, that proceedings to enforce this Judgment are stayed pending appellate finality, and pending compliance by plaintiffs with § 394a-2.0 of the Administrative Code of the City of New York and tender by plaintiffs to defendant of

a release in proper form for record in Wayne County, Pennsylvania.

Dated: New York, New York
March 31, 1978

s/
Charles L. Brieant
U. S. D. J.

JUDGMENT ENTERED - 4/3/78

Raymond F. Burghardt
CLERK

4/24/78 - Bill of Costs as taxed in the sum of $895.10, in favor of plaintiffs, as against defendants, and added to the judgment.

s/ Raymond F. Burghardt
CLERK

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 385-389—August Term, 1978.

(Argued February 5, 1979

Decided September 27, 1979.)

Docket Nos. 78-7196 - 78-7200

LILLIAN J. BADGLEY

EMIL LAKE and HELEN LAKE,

GEORGE ELWOOD, Admr., ESTATE OF B. VAN LOAN,

LLOYD and ELOISE L. CANFIELD,

GEORGE and HELEN GREGORY,

Plaintiffs-Appellees.

—v.—

THE CITY OF NEW YORK,

Defendant-Appellant.

Before:

WATERMAN, MANSFIELD and TIMBERS,

Circuit Judges.

City of New York appeals from judgments entered below, Southern District of New York, Brieant, J.,

opinion reported at 450 F.Supp. 846 (1978), holding appellant liable to these appellees in these cases, consolidated upon appeal. Appellees are Pennsylvania owners of Pennsylvanian riparian lands along the Delaware River, and they obtained judgments against the City for its alleged tortious manipulation of the waters of the River. Judgments reversed.

MICHAEL R. GOTTLIEB (Kalter & Gottlieb, Woodbourne, N.Y. on the brief) *for Appellees Elwood, Gregory, Badgley and Lake.*

JACK WEINBERG (Graubard, Moskowitz, McGoldrick, Lannett and Horowitz, New York City, and Herman E. Gottfried, Margaretville, N.Y., Jay C. Cooke and Steven J. Brill, of counsel, on the brief) *for Appellees Canfield.*

MORRIS EINHORN (Allen G. Schwartz, Corporation Counsel, New York City, L. Kevin Sheridan, Leonard Olarsch and William Murray, of counsel, on the brief) *for Appellant.*

WATERMAN, *Circuit Judge:*

These actions consolidated for trial, were brought by or in the name of, owners of riparian land situated in Pennsylvania, who claim that the value of their lands along the Delaware River and its West Branch was diminished by the City of New York's impoundment, diversion and manipulation of the headwaters of the Delaware River for the City's

public water supply purposes. The City's answer admitted that it impounds and diverts the Delaware waters and that it manipulates the flow of the river. The City contended, however, that these acts were authorized by the U.S. Supreme Court's equitable apportionment of the Delaware River waters, decreed in *New Jersey v. New York,* 347 U.S. 995 (1954) [*New Jersey v. New York IV*][1], litigation to which the Commonwealth of Pennsylvania was a party. Accordingly, the City asserted that the rights of these individual riparian landowners in Pennsylvania were adjudicated with those of Pennsylvania itself and are thus barred.

In June 1975, a non-jury trial on the issues of liability and damages was held in the United States District Court for the Southern District of New York (Brieant, District Judge). On September 4, 1976, the trial record was reopened to allow submissions by the parties with reference to legislation enacted in July 1976 (1976 N.Y. Laws ch. 888, codified at N.Y. Envir. Conserv. Law §§ 15-0801 to -0807 (McKinney Supp. 1979). On March 31, 1978, the trial court issued its decision, 450 F.Supp. 846 (SDNY 1978), setting forth its findings of fact and conclusions of

---

1 In the course of this opinion, reference will be made to various stages of the litigation concerning the equitable apportionment of the waters of the Delaware River by the United States Supreme Court. Because the same parties were involved at each stage, a Roman numeral suffix has been appended to the official citation to differentiate the separate stages. It should be noted that the separate stages, as set forth in the list below, follow a chronological order, rather than the order of their appearance in this opinion.
New Jersey v. New York I, 280 U.S. 528 (1930)
New Jersey v. New York II, 283 U.S. 805 (1931)
New Jersey v. New York III, 345 U.S. 369 (1953)
New Jersey v. New York IV, 347 U.S. 995 (1954).

law, awarding damages plus interest to the plaintiffs appellees and against the City. From that judgment the City appeals, raising three allegations of error: (1) that the district court erred in holding that common law riparian rights are not destroyed or altered in streams, the waters of which have been apportioned by a United States Supreme Court decree invoking the common law doctrine of equitable apportionment; (2) that the district court was incorrect in determining that the amount of damages to be awarded to appellees should not be affected by a post-trial two-year experimental program to ascertain if and to what extent certain of the damaging conditions underlying the judgment herein can be ameliorated; and (3) that the district court's method of computing damages was erroneous.

Inasmuch as we reverse the judgment below and order the entry of judgment for the appellant City, and as we base our holding upon the first issue, we need not and do not reach the latter two issues.

The Delaware River begins its flow within the bounds of New York State. The East Branch, which is entirely within New York State, and the West Branch, which is also entirely within New York State, except for approximately 8 miles above Hancock, N.Y., join at Hancock to form the main stream of the Delaware River. Thereafter the river flows in a generally southeasterly direction. Commencing about 4 miles south of Deposit, New York, the West Branch forms the boundary line between New York and Pennsylvania for approximately 8 miles, and thereafter the main stream forms the boundary line for some 68 miles to Port Jervis, N.Y. At Tri-State Rock, near Port Jervis, New York, the boundaries of

New Jersey, New York and Pennsylvania converge. Below Tri-State Rock the river constitutes the boundary between New Jersey and Pennsylvania, and at the head of Delaware Bay near Wilmington, Delaware it discharges into the Atlantic Ocean.

In order to meet its increasing need for supplies of public water New York City in 1929 began to plan the diversion of the waters of the Delaware River and its tributaries. Shortly thereafter, the State of New Jersey commenced an original suit in the U. S. Supreme Court against the State of New York and the City of New York to enjoin and restrain any diversion of the waters of the Delaware River and its tributaries. In its bill of complaint New Jersey alleged that the proposed diversion would deprive New Jersey "and its citizens as riparian owners along the Delaware River of the natural, unobstructed and undiminished flow of its waters in violation of their rights under the common-law," and would thereby "take the property of the plaintiff and its citizens without due process of law," in violation of the fourteenth amendment of the U.S. Constitution. New Jersey further alleged that the proposed diversion would substantially harm navigation, water power, sanitation, industrial use, oysters, fish, water supply, agriculture and recreation in the Delaware Valley basin.

The Commonwealth of Pennsylvania was permitted to intervene, *New Jersey v. New York I*, 280 U.S. 528 (1930), upon filing a Statement of Interest and Relief desired. In its statement Pennsylvania set forth its opposition to the application of the common law doctrine of riparian rights advocated by New Jersey inasmuch as that doctrine would prevent the

development and use of the Delaware River and its tributaries as a present and future source of water supply for Philadelphia and eastern Pennsylvania. Instead, Pennsylvania proposed a fair and equitable division of the waters of the Delaware River and its tributaries between the three states in accordance with the doctrine of equitable apportionment.

Following considerable testimony before Special Master Charles N. Burch, Esq., the Special Master prepared a report and recommended decree to the Supreme Court which was adopted and incorporated in the decision and decree entered on May 25, 1931. *New Jersey v. New York II*, 283 U.S. 805 (1931). The Decree, adopting the doctrine of equitable apportionment, limited New York's diversion to 440 million gallons daily (m.g.d.), and, as proposed by the Commonwealth of Pennsylvania, imposed a compensatory release plan. Under this plan, releases were required from New York reservoirs to maintain flows at Port Jervis, New York, at or above 1535 cubic feet per second (c.f.s.), and at Trenton, New Jersey, at or above 3400 c.f.s., provided that the maximum release required would be 30 per cent of the average diversion area's yield, or 402.6 c.f.s. The purpose of these releases was to protect downstream states from potential injuries to municipal, recreational and fishery uses, particularly during low-flow periods. The Decree also required the construction of a sewage treatment plant at Port Jervis. Paragraph 6 of the 1931 Decree provided that the Court's jurisdiction should be a continuing one and any party was authorized to apply subsequently for further action or relief, or for any modification of the Decree.

In April 1952 the City petitioned the Court to amend the 1931 Decree so as to allow an increase in the diversion of Delaware River waters of as much as 800 m.g.d. The States of New York, New Jersey, Pennsylvania and Delaware appeared as parties or as interveners, and the matter was referred to Special Master Kurt F. Pantzer, Esq. Following hearings before the Special Master and a lengthy series of negotiating sessions, the parties agreed to the terms of a consent decree to replace the 1931 Decree. This consent decree was reported by the Special Master and entered by the Court on June 7, 1954. *New Jersey v. New York IV*, 347 U.S. 995 (1954).

The 1954 Consent Decree authorizes the City of New York, following the completion of the Cannonsville Reservoir on the West Branch, to divert up to 800 m.g.d. subject to a new and somewhat different scheme for compensatory releases known as the "Montague Formula." This Formula requires the City to maintain certain minimum flows of water at Montague, New Jersey, approximately 75 miles downstream from the confluence of the East and West Branches of the River. The 1954 Decree further provides for certain excess releases depending upon the City's expected consumption of water, for the appointment of a River Master, and continues to require sewage treatment at Port Jervis. As in the 1931 Decree, the Court retained jurisdiction of the dispute, permitting the parties to apply for modification of the Decree, or for any pertinent supplemental orders. In 1961 the four basin states entered into a Compact creating the Delaware River Basin Commission (hereinafter "DRBC), Del. Code tit.7, §§ 6501-6511 (1974); N.J.Stat. Ann. §§ 32:11 D-1 to

D-110 (West 1963); N.Y. Envir. Conserv. Law §§ 21-0701 to -0723 (McKinney 1973); Pa. Stat. Ann. tit. 32, §§ 815.101—.106 (Purdon 1967), which Compact subsequently was approved by Congress, Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 (1961).

The general purposes of the Compact are "to promote interstate comity; to remove causes of present and future controversy; to make secure and protect present developments within the states; to encourage and provide for the planning, conservation, utilization, development, management and control of the water resources of the basin; [and] to provide for cooperative planning and action by the signatory parties with respect to such water resources." (Delaware River Basin Compact, Art.I, par.1-3(e)).

Throughout Article 3 of the Compact, the Article setting forth the powers and duties of the Commission, there is constant reference to limitations upon the Commission, limitations deriving from the Decree of the United States Supreme Court in *New Jersey v. New York IV*, 347 U.S. 995. Though in extraordinary circumstances, such as drought, the Commission may direct increases or decreases in any allocation or diversion or release of water required by the above mentioned decree, it is clear that, except for such an emergency, the Commission may not act,—and nothing in the Compact shall be construed—in any way so as to impair, diminish, or otherwise adversely affect the rights, powers, privileges, conditions, and obligations contained in that decree. For instance, Article 3, Section 3.3 reads as follows:

> 3.3 Allocations, Diversions and Releases. The Commission shall have the power from time to time as need appears, in accordance with the doctrine of equitable apportionment, to allocate the waters of the basin to and among the states signatory to this compact and to and among their respective political subdivisions, and to impose conditions, obligations and release requirements related thereto, subject to the following limitations:
>
> (a) The commission, without the unanimous consent of the parties to the United States Supreme Court decree in New Jersey v. New York, 347 U.S. 995 (1954), shall not impair, diminish or otherwise adversely affect the diversions, compensating releases, rights, conditions, obligations, and provisions for the administration thereof as provided in said decree; . . . .

subject, however, to the emergency provision previously mentioned.

Moreover, in Article 3, Section 3.4, each of the signatory states waived or relinquished for the duration of the Compact, any right, privilege or power a state may have to apply for any modification of the terms of the Decree in *New Jersey v. New York IV*, which would increase or decrease the releases required, except through a proceeding in the Supreme Court to modify the Decree or in the event of an emergency such as drought.

Despite the terms of the 1954 Decree and the Compact, the district court below found, 450 F.Supp. 846 (1978), that the plaintiffs as riparian owners are entitled to the "full natural flow of the Delaware River," *id.* at 864, and that "riparian rights within a

state are purely a matter of that state's concern . . . and are not, *by that fact alone*, destroyed or altered when the Supreme Court applies federal common law *to conflicts between the states* and apportions the total waters of the stream among the various competing interests." *Id.* at 866. The district court noted that any *parens patriae* suit brought by one state against another state for the single purpose of protecting the property rights of its individual citizens would be barred by the Eleventh Amendment to the U. S. Constitution. From this the court below concluded that the Commonwealth of Pennsylvania could not have the rights of these individual plaintiffs adjudicated in the proceedings before the Supreme Court. Accordingly, the district court rejected the City's argument that under the federal common law doctrine of equitable apportionment, as applied by the Supreme Court in *New Jersey v. New York II, supra*, the rights of these Pennsylvania plaintiffs were adjudicated with those of the Commonwealth of Pennsylvania, barring recovery by them here.

We cannot agree with the district court's conclusions. A careful analysis of the nature of *parens patriae* suits between states in original proceedings before the Supreme Court convinces us that, as a party to the proceeding, Pennsylvania represented all of its citizens, *United States v. Nevada*, 412 U.S. 534, 539 (1973); *Hinderlider v. La Plata Co.*, 304 U.S. 92, 106 (1938); *Wyoming v. Colorado*, 286 U.S. 494, 506-507 (1932); *Kentucky v. Indiana*, 281 U.S. 163, 173 (1930); *Kansas v. Colorado*, 206 U.S. 46, 99 (1907), and that the terms of the decree are thus conclusive upon all Pennsylvania citizens and bind their rights.

The Supreme Court has rejected reasoning similar to that relied upon by the district court.[2] In *Wyoming v. Colorado, supra*, the State of Wyoming brought a suit against the State of Colorado to enforce a decree of the Court rendered in an earlier suit between the same states dealing with their relative rights to divert and use for irrigation the waters of the Laramie River. There the Court stated:

> But it is said that water claims other than the tunnel appropriation could not be, and were not, affected by the decree, because the claimants were not parties to the suit or represented therein. In this the nature of the suit is misconceived. It was one between States, each acting as a quasi-sovereign and representative of the interests and rights of her people in a controversy with the other. Counsel for Colorado insisted in their brief in that suit that the controversy was "not between private parties" but "between the two sovereignties of Wyoming and Colorado"; and this Court in its opinion assented to that view, but observed that the controversy was one of immediate and deep concern to both States and that the interests of each were indissolubly linked with those of her appropriators. 259 U.S. 468. Decisions in other cases also warrant the conclusion that the water

2 See *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935), where the Court rejected the notion that the U.S. Secretary of the Interior was a necessary party to original proceedings before the Court to apportion the waters of the North Platte River. Inasmuch as the position of the Secretary of the Interior is that of an appropriator of water for storage under the laws of Wyoming, the Court reasoned that "[h]is rights can rise no higher than those of Wyoming, and an adjudication of the defendant's rights will necessarily bind him. Wyoming will stand in judgment for him as for any other appropriator in that state."

> claimants in Colorado, and those in Wyoming, were represented by their respective States and are bound by the decree.

286 U.S. at 508-509 (footnote omitted).

It is indeed true that the standing of states to bring *parens patriae* actions on behalf of their citizens is limited by the Eleventh Amendment's prohibition against suits by citizens of one state against another state. Thus a state acting *parens patriae* may not invoke the Supreme Court's original jurisdiction to protect the individual rights of its citizens. *Pennsylvania v. New Jersey*, 426 U.S. 660, 665-666 (1976); *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 258-259 (1972); *Oklahoma v. Atchison, T. & S.F.Ry.*, 220 U.S. 277 (1911); *Kansas v. Colorado*, *supra*, 206 U.S. at 98-99; *Louisiana v. Texas*, 176 U.S. 1 (1900); *New Hampshire v. Louisiana: New York v. Louisiana* (companion cases), 108 U.S. 76 (1883); *Pennsylvania v. National Ass'n of Flood Insurers*, 520 F.2d 11 (3d Cir. 1975). Nor may a state sue to recover damages on behalf of its individual citizens. *North Dakota v. Minnesota*, 263 U.S. 365, 375-376 (1923). Rather, a suit may be brought by a state "for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain." *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).

Thus, appellees are correct in asserting that Pennsylvania could not have brought suit or intervened in the suit against New York to protect a mere collectivity of private riparian rights. But to draw from

this the conclusion that the individual interests of Pennsylvania's riparian owners were not represented in the suit and are thus not affected by the Decree is to ignore the obvious fact that the riparian rights of the appellees are not independent of Pennsylvania's rights in the waters of the Delaware River but rather are derivative therefrom and are subject to change by the laws of that state. *Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931). Thus, it necessarily follows that the rights of Pennsylvania citizens cannot exceed those of Pennsylvania itself[3] and the extent of Pennsylvania's rights in the Delaware River was conclusively determined by the terms of the Decree.

Appellees maintain that the Supreme Court Decrees and Compact provisions cannot be interpreted in such a way as to divest them of their riparian rights to the full natural flow of the Delaware River without just compensation. The fact is, however, that Pennsylvania never had a right to

---

3 The Supreme Court early established that a state cannot grant to private parties title to *land* which is later determined by interstate compact or Supreme Court decree to be beyond the true boundaries of the state. *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838); *Poole v. Lessee of Fleeger*, 36 U.S. (11 Pet.) 184 (1837). The Court made clear that such determinations by compact or decree affect the private property rights of the citizens of a state as well as those matters which pertain to a state's sovereignty over the land within the boundaries of the state. "Title, jurisdiction, sovereignty, are, therefore, dependent questions, necessarily settled, when the boundary is ascertained, which, being the line of territory, is the line of power over it." *Rhode Island v. Massachusetts*, *supra*, 37 U.S. at 733. In *Poole v. Lessee of Fleeger*, *supra*, the Court held that the fixing of the boundary does not result in a "divestiture" of citizens' titles to lands which were derived from grants under the state. Rather, the citizens' titles are invalid, *ab initio*, due to "an intrinsic defect of title in the states." 36 U.S. at 210.

an undiminished flow of the Delaware River. As the Supreme Court made clear in its Decree in 1931:

> A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. *And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the River might come down to it undiminished.* Both States have real and substantial interests in the River that must be reconciled as best as they may be.

283 U.S. at 342-343 (emphasis added)

It is manifest that a state cannot grant to private parties any privately owned property interest in riparian rights greater than the state's own property interest in them.[4] In *Hinderlider v. La Plata Co.,*

4 See footnote 3, supra; and we also reject the district court's reliance upon the following language in the Supreme Court's 1954 opinion in *New Jersey v. New York IV, supra,* to support its conclusion that the Supreme Court did not "*directly* rule on the effect of its Decrees on individual riparian owners." 450 Supp. at 865. "No diversion herein allowed shall constitute a prior appropriation of the waters of the Delaware River or confer any superiority of right upon any party hereto in respect of the use of the waters." 347 U.S. at 1004. To our mind, this language reflects merely that the Court did not intend to establish any permanent "superiority of right" in any party because that party at the time of apportionment under the 1954 Decree was granted rights in the water apportioned by the Decree. Rather, said apportionment was meant to be subject to future modifications due to changes in circumstances affecting

supra, a Colorado company claimed that an interstate compact allocating the waters of the La Plata River denied its right to appropriate the water under an earlier decree of a Colorado court, thereby depriving it of its property without just compensation. The Supreme Court rejected this claim, explaining:

> It may be assumed that the right adjudicated by the decree [of the Colorado court] to the Ditch Company is a property right, indefeasible so far as concerns the State of Colorado, its citizens, and any other person claiming water rights there. But the Colorado decree could not confer upon the Ditch Company rights in excess of Colorado's share of the water of the stream; and its share was only an equitable portion thereof.

304 U.S. at 102.

Appellees attempt to avoid the clear applicability of *Hinderlider* to the present case by arguing that while the Supreme Court decree may preclude them from seeking equitable relief in order to obtain water in excess of their State's share of the river waters, as was sought by the Ditch Company in *Hinderlider,*

the equities of the apportionment. See *Nebraska v. Wyoming,* 325 U.S. 589, 622-623 (1945.) This interpretation is borne out in part by the words of Special Master Burch in his Report to the Supreme Court in 1931 wherein he identified this language as *not* pertaining to the rights of the Delaware River Basin States: "I do not think that the mere fact that the State and City of New York are first in point of time in taking waters from the tributaries of the Delaware River gives any superiority of right. While the doctrine of priority of appropriation is applied in some of the arid states of the west and is part of the public policy of such states, I find no such principle obtaining in New York, New Jersey, or Pennsylvania," at 191.

the decree does not affect their right to damages for a diminished flow. We do not agree, for so to hold would hobble or possibly even destroy the effect of Supreme Court decrees or Congressionally approved interstate water compacts by subjecting those who rely upon the provisions of the decrees or interstate compacts to unreasonable damage burdens. What the Supreme Court decreed would be rendered nugatory by damage awards to private owners, a result inherently inconsistent with the supremacy of the Supreme Court's decree of equitable apportionment. Accordingly, we reverse the lower court's holding that New York City's diversion of waters, diversion done pursuant to the terms of the 1954 Supreme Court decree, was an actionable wrong which could form the basis for damages.

This does not end our discussion, however, for the district court further held that

> [e]ven if we accept for the sake of argument the contention that Pennsylvania riparians on the Delaware are presently enjoying the full volume of water to which they were ever entitled, the fact remains that the City by its dams has materially altered and worsened the remaining waters of the Delaware, that is, has worsened the portions allotted, under the City's arguments, to Pennsylvania, New Jersey and Delaware. . . . [T]he City's works have adversely affected the temperature, flow, stage and quality of the River. The Supreme Court's Decrees were certainly not intended as licenses for the City to commit such injuries without liability.

450 F.Supp at 867.

In order to comprehend more fully the effects that the City's diversions and compensatory releases have had upon plaintiffs' riparian properties, it is necessary to describe in greater detail the location of the City's dams in relation to plaintiffs' properties and the manner in which the Montague Formula, as set forth in the 1954 Decree, is being met.

Pursuant to the 1931 Decree and the 1954 Amended Decree, New York City constructed three dams. The first to be built was that on the Neversink River, a tributary of the Delaware River, entering the Delaware River at Port Jervis, N.Y., a point approximately 67 miles below the confluence of the East and West Branches of the Delaware River at Hancock and about 8 miles above Montague. Impoundment of the waters of the Neversink River by the City began in 1953. The second dam to be constructed was the Pepacton Dam on the East Branch of the Delaware River, impoundment beginning there in 1954. The third dam was the Cannonsville Dam on the West Branch of the Delaware River, impoundment commencing in 1963.

The Elwood (Van Loan) parcel is the only one of plaintiffs' parcels located above the confluence of the East and West Branches, it being situated on the West Branch 13.5 miles down stream from the Cannonsville Dam. The remaining four parcels are on the mainstream, ranging from six to thirty miles downstream from Hancock.

There is no requirement in the Amended Decree identifying the sources of the mandated minimum flow at Montague. Uncontradicted testimony at trial showed that the River Master (charged with enforcement of the Decree) has relied increasingly over the

years on power plant releases on the Mongaup and Lackawaxen Rivers to make up the required flow at Montague. However, these power plant releases are not subject to the River Master's control and fluctuate greatly in the amounts of water released from time to time. Moreover, when the River Master does call upon the City for releases to supplement the flow at Montague, the City has the discretion to release the water called for from any one or from all three of its reservoirs. Inasmuch as the power company releases and the Neversink Dam releases enter the Delaware River upstream of Montague but downstream from plaintiffs' properties, the flow of water past plaintiffs' premises on any given day is not directly assured by the provisions of the decree. Thus, while it is possible for the releases called for to maintain the Montague Formula to be fulfilled totally by the power plant releases, records indicate that the City has, in the past, made releases from the Cannonsville Reservoir which have approximated one billion gallons of water per day. 450 F. Supp. at 859. Thus, the district court found that there were substantial fluctuations on a daily basis in the flow of water as it passed by appellees' premises. The court also found that, inasmuch as the City's dams were constructed in such a way as to release water from the *bottom* of the dams, where the water temperature averages 40° Fahrenheit year-round, unaffected by air temperature, the river temperature in the summer in front of plaintiff's properties fluctuated between the upper 50's and the 70's, rendering the river suitable as neither a warm-water fishery nor a cold-water fishery. Also, it further found that the fluctuations in volume, stage, flow

and temperature of the river, produced by the City's meeting the Montague Formula, had adverse effects on swimming, boating, and the general ecology of the river, and, in particular, it noted the growth of slime, algae and mosquitoes along the river. *Id.* at 870-871.

The rights of appellees to collect damages for the City's acts relative to the waters of the Delaware River, as described above, depend upon the scope of rights granted to the City under the terms of the Decree and Compact. For, as we determined above, the rights of these Pennsylvania citizens are no greater than those of Pennsylvania, and they may not exceed Pennsylvania's rights to the extent that they interfere with the rights granted to the City under the terms of the Decree and Compact by placing an onerous price upon the exercise of those rights.

The question then becomes one of interpretation as to the scope of the rights granted to the City under the terms of the 1954 Decree and Compact. Put simply, New York City was given the right to divert 800 m.g.d. subject to certain conditions of river management. One must query whether these conditions were meant to be exclusive, specifically leaving to the City the right to exercise its discretion in choosing the means by which to meet these conditions of river management. Or did the Court merely establish a very general release scheme, setting forth only minimum standards of river regulation without intending to address specifically issues relative to the impact that the operation of such a general release scheme might have upon the various downstream riparian interests?

An analysis of the proceedings before the Special Masters and of the terms of the 1931 and 1954 Decrees convinces us that the Court intended to establish a comprehensive scheme of river regulation, all-inclusive as to all matters concerning the manipulation of the flow of the undiverted portions of the waters of the Delaware River. In arriving at the terms of the Decrees the Special Masters took into consideration numerous and varied factors, indicating distinctly "the nature of the problem of apportionment and the delicate adjustment of interests which must be made." *Illinois v. City of Milwaukee*, 406 U.S. 91, 106 (1972), (quoting *Nebraska v. Wyoming, supra*, 325 U.S. at 618). Evidence taken in the proceedings covered not only considerations of municipal water supply needs but also those of ecology, sanitation, fisheries, and recreation on and along the undiverted river waters.

Appellees maintain that their rights to the recreational value of the river properties could not have been and were not advanced in the proceedings before the Supreme Court. However, recreational interests, and the possibility that such interests would be harmed by the proposed diversion and release schemes, were advanced by the State of New Jersey on behalf of its citizens. And, indeed, such considerations played a major role in the Court's rejection of the New York plan of release, a reduction of the City's original request in 1931 for diversion of 600 m.g.d. to an allowed diversion of only 400 m.g.d. and in the requirement of sewage treatment.[5]

5 See page 146 of the Report of Special Master Charles N. Burch to the U. S. Supreme Court in the proceedings of *New Jersey v. New York II* (1931).

Moreover, to the extent that their properties were located across the river from those of the New Jersey riparian landowners, the interests of downstream Pennsylvania riparians in the recreational uses of the river were necessarily considered along with those of the New Jersey property owners.[6] That the recreational interests of Pennsylvania riparians, such as appellees, whose lands were farther upstream, were not stressed in either the 1931 or 1954 proceedings is due in large measure to Pennsylvania's emphasis in both proceedings upon the industrial and water supply needs of Philadelphia and southeastern Pennsylvania. This overriding concern of Pennsylvania was evident at several stages of the proceedings before the Court.

In the 1931 proceeding evidence presented by Pennsylvania pertained primarily to proof that no substantial damage would be caused by the New York diversion if taken pursuant to the Pennsylvania plan of impounding and release, a plan which was ultimately adopted by the Special Master as a better plan than that proposed by New York. The New York plan of release guaranteed only that there would be a total flow of 275 c.f.s. during every day of July, August, September and October immediately

6 On page 140 of his Report, Special Master Burch said with reference to the recreational value of Pennsylvania riparian lands: "In this connection it should be remembered that the State of Pennsylvania, on the opposite bank of the Delaware River from New Jersey, is just as much interested in any damage to the Delaware River as the State of New Jersey and, if any damage is sustained, those damages will be borne by Pennsylvania to the same extent as New Jersey, with the exception of damage to oyster beds. . . . The pleasure and recreational activities and developments appear to be greater on the Pennsylvania shore than on the New Jersey shore."

below the point of storage and that there would be a similar flow of 275 c.f.s. below the point of storage on every day during the remaining eight months when the water yield of the diversion area was less than 275 c.f.s.[7] Thus it appears that the New York plan of release proposed in 1931 would not have resulted in the sort of drastic fluctuation in flow, stage and temperature during the summer months which appellees now find to be so objectionable. It appears, however, that appellees' sovereign, Pennsylvania, made the policy decision to oppose this plan in favor of one providing for a greater stabilization of downstream river conditions.

In the 1954 proceedings Pennsylvania conceded that "no present injury will be done to it if New York builds the Cannonsville Reservoir, diverts 800 m.g.d. and releases water according to the Montague Formula." Indeed, the Commonwealth of Pennsylvania explicitly recognized the beneficial value of the Montague Formula to its citizens in its memorandum of December 7, 1976, presented to the District Court in response to that Court's request that the parties in the original action state their position with regard to New York Environmental Conservation Law §§ 15-0801 [1], 15-0805 [2] enacted in July 1976 (1976 N.Y. Laws ch. 888). This Conservation Law represented an attempt by the New York legislature to ameliorate the detrimental impact of New York City's release regime upon recreational uses of the Delaware River and its tributaries below the dams. In its memorandum, Pennsylvania opposed any new release regimen that would in any way threaten the

7 See Report of Special Master Burch at 55.

City's ability to meet the Montague Formula in periods of drought, stating that the

> [m]aintenance of the Montague Formula flows is vital for the protection of downstream municipal industrial, recreational, fishery and other uses. It is not simply a legal requirement but a physical necessity. During drought conditions, the releases provided under the Formula are crucial in assuring water supplies to southeastern Pennsylvania and southern New Jersey. Without adequate flow, saline intrusion migrates up the River from the estuary threatening both Philadelphia and Camden public water systems.

When one considers the cost to New York City of meeting the requirement of the Montague plan, it becomes apparent that Pennsylvania was indeed successful in demanding and securing for its citizens costly compensating benefits in exchange for the City's diversions. For instance, under the terms of the Decrees, the City is required to devote approximately 32% of the storage capacity of its three dams to assure adequate flows at Montague during dry or low-stage periods of the river, resulting in a 250% increase in the observed minimum flow of the river.[8] As counsel for appellant asserts without contradiction, the City's expenditure for that additional storage capacity alone cost it approximately $30 million.[9] In light of the City's costly disbursements

8 See page 82 of the Report of the Special Master Kurt F. Pantzer to the U. S. Supreme Court in the proceedings of *New Jersey v. New York IV*.

9 Appellant's Brief, p. 15.

for the benefit of the lower basin states, it hardly would appear equitable to require a supplemental outlay for the payment of damages to riparian landowners such as appellees.

That appellees do not receive the same benefits of stabilization in the stage and flow of the river as do downstream Pennsylvania riparians is simply a matter of intramural dispute over the distribution of water within the Commonwealth. Appellees cannot be allowed to collaterally attack, in this suit against New York City, the wisdom of the policy choices made by their sovereign in the representation of all of its citizens acting in its capacity of *parens patriae*.

In denying the City of Philadelphia's motion to intervene in the 1954 proceedings, the Court stated that

> the state, when a party to a suit involving a matter of sovereign interest, "must be deemed to represent all of its citizens." *Kentucky v. Indiana*, 281 U.S. 163, 173-174 (1930). The principle is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.

New Jersey v. New York III, 345 U.S. 369, 372-373.

Appellees cannot recover from New York City for what their own sovereign has ceded in their behalf. Their rights of recovery, if any, lie against Pennsylvania. In both the 1931 and the 1954 proceedings

before the Supreme Court, Pennsylvania did not oppose the diversions by the City provided the water was taken pursuant to the plans of impoundment and release which were in fact ultimately adopted by the Court. Moreover, in 1961, Pennsylvania entered into the Delaware River Basin Compact, the provisions of which deny the DRBC the power to

> [e]xercise any jurisdiction, except upon consent of all the parties [to the 1954 Supreme Court Decree] over the planning, design, construction, operation or control of any projects, structures or facilities constructed or used in connection with withdrawals, diversions and releases of waters of the basin authorized by said decree or of the withdrawals, diversions or releases thereunder.

Delaware River Basin Compact § 3.5(c).

The provisions of the compact further forbid the DRBC to "[i]mpose or collect any fee, charge or assessment with respect to diversions of waters of the basin permitted by said decree." *Id.* § 3.5(b).

To grant appellees damages for injuries to their riparian properties which arise from the City's meeting of the Montague Formula would amount to a total circumvention of these Compact provisions and would accomplish what would otherwise require the unanimous consent of all parties to the Decree.[10]

10 Appellees cannot be permitted to mount such a collateral attack seeking personal damages. For, as the Supreme Court stated in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 239 (1907), whether a state "by insisting upon [its claim in its capacity as quasi-sovereign] is doing more harm than good to her own citizens is for her to determine."

See also *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-341 (1958) (citations omitted):

The 1954 Decree specifically allows the City to maintain the required flow at Montague by releasing water from "*one or more* of its storage reservoirs in the upper Delaware watershed." *New Jersey v. New York IV*, *supra*, 347 U.S. at 997 (emphasis added). Thus the City is within its rights in choosing to meet the calls by the Special Master for additional water to maintain the flow at Montague by, for instance, releases entirely from the Cannonsville Reservoir.

The Decree does not address itself to the location on the dams to be constructed by the City of the apertures thereon from which impounded water is to be discharged, nor address itself to possible fluctuations in temperature which could result from placement of the apertures at the bottom of the dams. No party to the Decree raised this issue in the course of the proceedings before the Special Master. Indeed, it would appear that if the impoundment and release procedure does produce injurious fluctuations in water temperature, such an occurrence would be the sort of "unforeseen particular"[11] in anticipation of which the Court retained jurisdiction to allow for

---

The final judgment of the Court of Appeals was effective, not only against the State, but also against its citizens, including the taxpayers of Tacoma, for they, in their common public rights as citizens of the State, were represented by the State in those proceedings, and, like it, were bound by the judgment.

11 *New Jersey v. New York II*, *supra*, 283 U.S. at 344. See also, page 207 of the Report of Special Master Burch, note 5 *supra*, wherein he recommended that the Pennsylvania plan of release be approved, "subject to such modifications as actual tests and experience may indicate, and without prejudice to any party to this case to apply for modification."

further modifications of the terms of its Decree. However, by 1961 both the Neversink and Pepacton Dams had been completed; none of the parties to the Decree had applied for modification of its terms; and all the parties to the Decree had entered into the Delaware River Basin Compact, whose provisions further clarify the circumstances under which the parties to the Decree may apply to the United States Supreme Court for a modification of the terms of the Decree.

Curiously, appellees have placed great reliance upon the following language in the Compact: "Nothing contained in this compact shall be construed as affecting or intending to affect or in any way to interfere with the law of the respective signatory parties relative to riparian rights." *Delaware River Basin Compact*, Art. 14, § 14.19. However, to interpret this provision as intending to allow for an award of damages for injury resulting from conduct clearly authorized by the terms of the 1954 Decree would put this section of the Compact in unreasonable conflict with several other sections thereof. See *Delaware River Basin Compact*, Art. 3, §§ 3.3(a), 3.5. Accordingly, we construe this provision to mean no more than that, within the limits of the Supreme Court Decree, the private riparian owners may enforce riparian rights against anyone who violates them.

In short, appellees here have no direct means of obtaining the relief they request from appellant City for the injuries they complain of. If a remedy directed at moderating these variations in water temperature is now indicated, that remedy must now lie either in an application to the United States

Supreme Court by a party to the Decree for a modification of its terms or in an application to the DRBC by a signatory state to the Delaware River Basin Compact for a similar modification to the terms of the Compact, which application can only be entertained upon the unanimous consent of all of the parties to the Decree.

The judgments below are reversed.

28c(4894)

570—7-28-79 • USCA—4391

RECORD PRESS, INC., 157 Chambers St., N.Y. 10007, (212) 243-5775

APPENDIX D

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of September one thousand nine hundred and seventy-nine.

Present: HON. STERRY R. WATERMAN

HON. WALTER R. MANSFIELD

HON. WILLIAM H. TIMBERS

Circuit Judges,

LILLIAN J. BADGLEY,
EMIL LAKE and HELEN LAKE,
GEORGE ELWOOD, Admr., ESTATE of B. VAN LOAN,
LLOYD and ELOISE L. CANFIELD,
GEORGE and HELEN GREGORY,
Plaintiffs-Appellees,

vs.

THE CITY OF NEW YORK,
Defendant-Appellant.

(Docket Nos. 78-7196 - 78-7200)

DOCKETED AS
A JUDGMENT # 80,0196
ON February 25, 1980

FILED SEP 27, 1979
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are reversed in accordance with the opinion of this court with costs to be taxed against the appellees.

A. DANIEL FUSARO,
Clerk

By: Arthur Heller,
Deputy Clerk

(A true copy,
A. Daniel Fusaro, Clerk
by Rolanne Henry,
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

(Docket Nos. 78-7196 - 78-7200)

September Term, 1978.

STATEMENT OF COSTS

Taxed in favor of Appellant, in

LILLIAN J. BADGLEY,
EMIL LAKE and HELEN LAKE,
GEORGE ELWOOD, Admr., Estate of B. VAN LOAN,
LLOYD and ELOISE L. CANFIELD,
GEORGE and HELEN GREGORY,

Plaintiffs-Appellees

vs.

THE CITY OF NEW YORK

Defendant-Appellant.

No. 385-389

Docketing Action	$ 250.00
Cost of Printing Appendix	2,749.65
Cost of Printing Brief	210.55
Costs of Pringing [sic] reply Brief	81.90
Taxed at the sum of ..	$3,292.10

A. DANIEL FUSARO,
.....
Clerk

BY: Arthur Heller,
Deputy Clerk

APPENDIX E

APPENDIX E

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-third day of January, one thousand nine hundred and eighty.

Present: HON. STERRY R. WATERMAN

HON. WALTER R. MANSFIELD

HON. WILLIAM H. TIMBERS

Circuit Judges.

LLOYD and ELOISE L. CANFIELD,

Plaintiffs-Appellees 78-7199

v.

THE CITY OF NEW YORK,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellees.

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

s/
A. DANIEL FUSARO, Clerk

FILED JAN 23 1980
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-third day of January, one thousand nine hundred and eighty.

----------X

LLOYD and ELOISE L. CANFIELD,

Plaintiffs-Appellees 78-7199

v.

THE CITY OF NEW YORK,

Defendant-Appellant

----------X

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees, and no active judge or judge who was a member of the panel having requested that a vote be taken

on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/
Chief Judge
IRVING R. KAUFMAN

FILED JAN 23 1980
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

APPENDIX F

APPENDIX F

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED HEREIN

U.S. CONSTITUTION

U.S. CONST. amend V provides, in pertinent part:

> "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. CONST. amend. XIV provides, in pertinent part:

> ". . . No state shall . . . deprive any person of . . . property, without due process of law...."

[APPENDIX F Continued]

DELAWARE RIVER BASIN COMPACT

1.6 Duration of Compact.

(a) The duration of this compact shall be for an initial period of 100 years from its effective date, and it shall be continued for additional periods of 100 years if not later than 20 years nor sooner than 25 years prior to the determination of the initial period or any succeeding period none of the signatory states, by authority of an act of its legislature, notifies the commission of intention to terminate the compact at the end of the then current 100 year period.

* * *

3.4 Supreme Court Decree; Waivers. Each of the signatory states and their respective political subdivisions, in consideration of like action by the others, and in recognition of reciprocal benefits, hereby waives and relinquishes for the duration of this compact any right, privilege or power it may have to apply for any modification of the terms of the decree of the United States Supreme Court in New Jersey v. New York, 347 U.S. 995 (1954) which would increase or decrease the diversions authorized or increase or decrease the releases required thereunder, except that a proceeding to modify such decree to increase diversions or compensating releases in connection with such increased diversions may be prosecuted by a proper party to effectuate rights,

powers, duties and obligations under Section 3.3 of this compact, and except as may be required to effectuate the provisions of paragraphs IIIB3 and VB of said decree.

* * *

14.19 Effect on Riparian Rights. Nothing contained in this compact shall be construed as affecting or intending to affect or in any way to interfere with the law of the respective signatory parties relating to riparian rights.

STATE CONSTITUTION

Pa. CONST. art. 1, § 10, provides in pertinent part:

> "[P]rivate property [cannot] be taken or applied to public use, without authority of law and without just compensation being first made or secured." (Emphasis supplied)

STATE STATUTES AND REGULATIONS

1 Smith, Laws Pa., provides:

V. Be it therefore enacted, and it is hereby enacted, That all and every the estate, right, title, interest, property, claim and demand of the heirs and devisees, grantees, or other claiming as Proprietaries of Pennsylvania, whereof they or either of them stood seized, or to which they or any of them were entitled, or which to them were deemed to belong, on

the fourth day of July, in the year of our Lord one thousand seven hundred and seventy-six, of, in or to the soil and land contained within the limits of the said late province, now state of Pennsylvania, or any part thereof, together with the royalties, franchises, lordships, and all other the hereditaments and premises compromised, mentioned and granted in the same charter, or letters patent of the said King Charles the second (except as herein after is excepted) shall be, and they are hereby vested in the commonwealth of Pennsylvania, for the use and benefit of the citizens thereof; freed and discharged, and absolutely acquitted, exempted and indemnified, of, from and against all estates, uses, trusts, entails, reversions, remainders, limitations, charges, incumbrances, titles, claims and demands, whatsoever, from, by or under the said charter, or letters patent, or otherwise, as fully, clearly, and entirely, as it the said charter, or letters patent, and the estates, interests, hereditaments and premises, therein comprised, mentioned and granted, and all other the estate, right and title of the said Proprietaries, of, in and to the same premises, were herein transcribed and repealed.

VI. And be it further enacted, That the said soil and lands, hereditaments and premises, and every part and parcel thereof (except as is herein excepted) from and after the date hereof, shall be subject to such disposal, alienation, conveyance, division and appropriation, as to this or any future legislature of this commonwealth, shall from time to time seem

meet and expedient, in pursuance of such law or laws as shall for that purpose hereafter be made and provided.

VII. Provided always, and be it enacted, That all and every the rights, titles, estates, claims and demands, which were granted by or derived from the said Proprietaries, their officers or others by them duly commissioned, authorized and appointed, or otherwise, or to which any person or persons, other than the said Proprietaries, were or are entitled, either in law or equity, by virtue of any deed, patent, warrant or survey, of, in or to any part or portion of the lands comprised and contained within the limits of this state, or by virtue of any location filed in the Land-Office, at any time or times before the said fourth day of July, in the year of our Lord one thousand seven hundred and seventy-six, shall be, and they are hereby confirmed, ratified and established for ever, according to such estate or estates, rights or interests, and under such limitations and uses, as in and by the several and respective grants and conveyances thereof are directed and appointed. (Emphasis supplied)

VIII. Provided also, and be it enacted, That all and every the private estates, lands and hereditaments, of any of the said Proprietaries, whereof they are now possessed, or to which they are now entitled, in their private several right or capacity, by devise, purchase or descent; and likewise all the lands called and known by the name of the Proprietary Tenths or Manors, which were duly sur-

veyed, and returned into the Land-Office, on or before the fourth day of July, in the year of our Lord one thousand seven hundred and seventy-six, together with the quit or other rents, and arrearages of rents, reserved out of the said proprietary tenths or manors, or any part or parts thereof, which have been sold, be confirmed, ratified and established for ever, according to such estate or estates therein, and under such limitations, uses, and trusts, as in and by the several and respective reservations, grants and conveyances thereof, are directed and appointed.

Titles Confirmed

5 Smith, Laws Pa., provides:

Under the proprietaries' government, no title was considered as good in law until a patent was granted and enrolled in the rolls office. See an extract from a commission of the commissioners of property in the preceding pages, as also others in the land-office.

The reason is plain, because all warranties and applications were granted conditionally; which, if not complied with, the proprietaries or their commissioners, were at liberty, according to said conditions, to grant the land to others.

After the revolution the legislature, by the act of the 27th of November, 1779,

confirmed the titles, claims, or demands, which had been derived from the proprietaries or their officers, either in law or equity, "according to such estate, &c. as in and by the several and respective grants and conveyances thereof, ..c directed and appointed." And by the act of the 9th of April, 1781, patents are directed to issue to "all and every person or persons," &c. for lands for which no patents had been previously issued; provided the party applied within a limited time, which time has been extended until the 1st of January, 1811, after which time an additional interest is to be paid. By an act passed 30th of December, 1785, it was provided too, that no warrant should issue for any tract of land on which a settlement had been made, unless to such person or persons respectively, who had made the same, or their legal representative, until after the 10th day of April, 1788. The benefit of this act to such settlers, has also been extended till the said 1st of January, 1813, after which it will rest with the legislature to extend the provisions of said law, or make such farther regulations as they may deem necessary.

A patent was a grant complete both in law and equity, and as such confirmed by the act of 1779, to the holder, unless some fraud had been practised in obtaining it, or the land had been previously granted to some other person.

These unpatented proprietary rights have, in many cases, been considered su-

perior to rights acquired since the revolution; yet there are cases where equity would seem to ban such claims: that is, where an original applicant or warantee had not paid any purchase money or taxes, nor had ever taken possession of the land, or exercised acts of ownership on the same, and the person under the later right had done these things. In such cases it would be just to plead the original applicant's non-compliance, and the proprietaries' usages, as a bar to his recovery: and certain it is, that the later right under the practice of the proprietary's land-office would have been preferred. Nor does the acts of assembly confirm proprietary rights otherwise than according to the estate vested by said rights agreeably to the usages; of course it would be necessary to refer to original agreements, or the terms of warrants and applications, to know how to decide.

The legislature having sanctioned such claims, cannot again interfere until after the 1st of January, 1813, when they may again extend the time for payment, or make such other regulations as may be necessary, because after that time, persons claiming under proprietary rights will be in the power of the legislature, as much as they would have been in the power of the proprietaries, after they had failed to comply with the conditions, their warrants or applications were subject to.

In testimony that the foregoing extracts are correct, as stated, and that the notes subjoined are corresponding with the usages of the land-office, during the

proprietaries' government, to the best of my knowledge and belief, I have hereunto set may hand, at Harrisburgh, this 10th day of October, Anno Domini, 1812.

JOHN COCHRAN, Secretary
Land-Office.

N.Y.C. Admin. Code provides:

§ K51-26.0 Definitions; special provision concerning acquisition of real estate used for public purposes.--The term real estate as used in this article shall be construed to signify and embrace all uplands, lands under water, the waters of any lake, pond or stream, all water rights or privileges, and any and all easements and incorporated hereditaments and every estate, interest and right, legal and equitable, in land or water, including terms for years, and liens thereon by way of judgment, mortgages or otherwise, and also all claims for damage to such real estate. It shall also be construed to include all real estate (as the term is above defined) heretofore or hereafter required or used for railroad, highway or other public purposes, providing the persons or corporations owning such real estate or claiming interest therein, shall be allowed the perpetual use for such purposes of the same or of such other real estate to be acquired for the purposes of this article as will afford practicable route or location for such railroad, highway or other public purpose, and in the case of a railroad, commensurate with and adapted to its needs; and provided also

that such persons or corporations shall not directly or indirectly be subject to expense, loss or damage by reason of changing such route or location, but that such expense, loss or damage shall be borne by the city. In case any real estate so acquired, or used for public purposes, is sought to be taken or affected for the purpose of this article there shall be designated upon the maps referred to in the previous sections of this article, and there shall be described in the petition, hereinbefore referred to, such portion of the other real estate shown on such maps and described in such petition, as it is proposed to substitute in place of the real estate then used for such railroad, highway or other public purposes. Provided, that wherever the board of water supply has heretofore located on any map filed in the office of such commissions, a substituted route for any railroad, the same shall not be subsequently changed without the assent of such company. The supreme court at the special term to which the petition is presented or at such other special term as the consideration thereof may be adjourned to, shall either approve the substituted route or refer the same back to the board of water supply for alteration or amendment and may refer the same back, with such directions or suggestions as such court may deem advisable, and as often as necessary and until such commissioners shall determine such substituted route as may be approved by the court. An appeal from any order made by such court at special term, under the provisions of this section, may be taken by any person or corporation interested in and

aggrieved thereby to the appellate division and court of appeals, and shall be heard as a non-enumerated motion. The commissioners of appraisal, hereinbefore referred to, in determining the compensation to be made to the persons or corporations owning such real estate, or claiming interest therein, shall include in the amount of such compensation such sum as shall be sufficient to defray the expenses of making such change of route and location and of building such railroad or highway. Such commissioners of appraisal shall suggest in their report, and the court in the order confirming such report shall determine, subject to review by the appellate division, what reasonable time after payment of the awards to such persons or corporations shall be sufficient within which to complete the work of making such change. Neither the city, nor the board of water supply shall be entitled to take possession or interfere with the use of such real estate for the enumerated purposes, before the expiration of such time. Such time may be subsequently extended by the court (subject to review as aforesaid) upon a sufficient cause shown. After the expiration of this time so determined or extended no use shall be made of such real estate which shall cause pollution to the water in such reservoir or interfere with its flow.

§ K51-44.0 Damage to value of real property; businesses, and employees thereof.--

a. The owner of any real estate not taken by virtue of this article and arti-

cle eleven of the conservation law or of any established business on the first day of June, nineteen hundred five, except as hereinafter provided, and situate in the counties of Ulster, Albany or Greene, directly or indirectly decreased in value by reason of the acquiring of land by the city for an additional water supply or by reason of the execution of any plans for such additional water supply by the city under the provisions of this article and article eleven of the conservation law, their heirs, assigns or personal representatives shall have a right to damages for such decrease in value. The owner of any real estate not taken by virtue of this article or of any established business on the first day of December, nineteen hundred fourteen, except as hereinafter provided, situate in the counties of Ulster, Greene, Delaware or Schoharie, directly or indirectly decreased in value by reason of the acquisition, after the passage of this article, of land by the city for an additional water supply from the Schoharie watershed, or by reason of the execution of any plans for such additional water supply from such watershed, under the provisions of this article, his assigns or personal representatives, shall have a right to damages for such decrease in value. The owner of any real estate, not taken, situate in any one or more of the counties of Ulster, Delaware, Orange or Sullivan, or of any established business, directly or indirectly decreased in value by reason of the execution of any plans for or by the acquisition of land by the city for a water supply from the Rondout and Delaware watersheds except that portion of the Delaware watershed of the west branch of the Dela-

ware river within such counties, or any of them, and the owner of any real estate, not taken, situate in any one or more of such counties or situate in the corporate limits of the village of Deposit in the county of Broome existing on the first day of April, nineteen hundred fifty-nine, or of any established business, which business was established on or prior to the first day of April, nineteen hundred fifty-nine, which is directly or indirectly decreased in value by reason of the execution of any plans for or by the acquisition of land by the city for a water supply from the watershed of the west branch of the Delaware river, pursuant to law, his or its assigns, or personal representatives in any such case shall have a right to damages for such decrease in value, from the time of the beginning of such decrease in value, provided, however, that in the case of an established business, the recovery of or award made to any claimant shall not include any business that may have resulted by reason of the execution of any plans for such water supply. The board of water supply may agree with such person as to the amount of such damages, and if such agreement can not be made such damages, if any, shall be determined in the manner herein provided for the ascertaining and determining the value of real estate taken under the provisions of this article, and the commissioners shall not be limited in the reception of evidence to the rules regulating the proof of direct damages. They may also recommend such sums, if any, as shall seem to them proper to be allowed to parties appearing in the proceeding, as expenses and disbursements, including

reasonable compensation for witnesses. The amount of such damages so agreed upon as aforesaid or determined as aforesaid shall be payable and collectible in the same manner as is herein provided in the case of awards made through the confirmation of a report of commissioners of appraisal. . . .

New York Environmental Conservation Law § 15-0511, provides:

Statement of legislative findings and policy

1. . . . [T]he legislature hereby finds that the volume and abrupt changes in the volume of releases of water from impounding reservoirs of water have a capacity of more than one billion gallons [including the reservoirs involved in this case] and located in the counties of Delaware, Greene, Putnam, Schoharie, Sullivan, Ulster and Westchester have damaged the recreational uses, such as trout fishing and canoeing, of waters affected by such releases, that such waters are a recreational resource for residents from all parts of the state of New York and elsewhere, that such recreational resource benefits the economy and welfare of this state and that the volume and rate of change of volume of such releases can be regulated to protect and enhance the recreational use of waters affected by such releases while ensuring and without impairing an adequate supply of water for power production or for any municipality which uses water from such reservoirs for drinking and other purposes.

APPENDIX G

MILES DOWNSTREAM FROM
CANNONSVILLE DAM
DOWNSVILLE DAM
CONFLUENCE
DRAINAGE AREAS, SQ. MI.
ORIGINAL
BELOW DAMS
% OF ORIGINAL
PARCEL
VAN LOAN 15.5 — — 622 172 27.7
BADGLEY 24.5 39.8 6.14 1216 595 43.8
LAKE 36.8 51.7 19.12 1636 815 49.8
GREGORY 39.1 54.4 20.75 1683 862 51.2
DURYEA 40.3 55.9 22.15 1689 868 51.4
CANFIELD 48.9 64.1 30.50 1830 1009 55.1
SCHOHARIE RESERVOIR
D.A. = 450 SQ.MI.
D.A. = 371 SQ.MI.
CANNONSVILLE RESERVOIR
PEPACTON RESERVOIR
ASHOKAN RESERVOIR
NEVERSINK RESERVOIR
RONDOUT RESERVOIR
WEST BRANCH RESERVOIR
KENSICO RESERVOIR
NEW YORK
PENNSYLVANIA
NEW JERSEY
CONNECTICUT
MASSACHUSETTS
VAN LOAN
BADGLEY
LAKE
GREGORY
DURYEA
CANFIELD
DELAWARE AQUEDUCT
HUDSON RIVER
NEW CROTON AQUEDUCT
OLD CROTON AQUEDUCT
SHANDAKEN TUNNEL
CATSKILL CREEK
ESOPUS CREEK
WALTON
DEPOSIT
HALE EDDY
HANCOCK
FISHS EDDY
DOWNSVILLE
MARGARETVILLE
BINGHAMTON
SUSQUEHANNA
UNADILLA RIVER
LYSANDER
DELAWARE RIVER
EAST BRANCH
WEST BRANCH
CALLICOON
LIBERTY
MONTICELLO
NARROWSBURG
BARRYVILLE
GODEFFROY
MONGAUP
ELLENVILLE
ROSCOE
WILLENRAUPACK
PORT JERVIS
MINISINK
DELAWARE WATER GAP
WALLPECK BEND
FLAT BROOK
BUSHKILL CREEK
SCRANTON
WILKES BARRE
SUSQUEHANNA RIVER
LEHIGHTON
BELVIDERE
EASTON
PHILLIPSBURG
BETHLEHEM
ALLENTOWN
HEGELSVILLE
MUSCONETCONG RIVER
FRENCHTOWN
RARITAN RIVER
NEW BRUNSWICK
RARITAN BAY
PRINCETON
LAMBERTVILLE
READING
PATTERSON
PASSAIC RIVER
SADDLE RIVER
HACKENSACK RIVER
NEWARK
NEW YORK CITY
LONG ISLAND
LONG ISLAND SOUND
BABYLON
OYSTER BAY
PORT JEFFERSON
TARRYTOWN
WHITE PLAINS
NORWALK
BRIDGEPORT
DANBURY
WEST POINT
PEEKSKILL
NEWBURG
POUGHKEEPSIE
HYDE PARK
KINGSTON
CATSKILL
HUDSON
GREAT BARRINGTON
CANAAN
HOUSATONIC RIVER
NAUGATUCK RIVER
CITY OF NEW YORK
BOARD OF WATER SUPPLY
DELAWARE RIVER
UPPER WATERSHED
IN RELATION TO THE
NEW YORK CITY WATER SUPPLY SYSTEM
0 4 8 12 16 MI.
NOVEMBER 23, 1930

APPENDIX H

APPENDIX H

LEGISLATIVE HISTORY OF § 14.19 OF COMPACT

Delaware River Basin Advisory Committee Meeting Staff Summary of Discussion

4. Private Riparian Rights: Miller explained that the language of section 15.3* was drawn from the Federal Power Act, and that it had been added to the compact only to assuage the fears of those who may think that the compact will change private water rights. At the suggestion of Zimmermann the Committee agreed to insert existing before "law" in the third line; to substitute riparian for "private" in the fourth line; and, to strike everything following "rights" in the fourth line. It was also agreed to refer this section to the lawyers for review of language but not for substantive change. (Emphasis supplied)

Minutes of Delaware River Basin Advisory Committee

IV. Compact: Further discussion of Draft "D" of compact was the principal order of business. Deliberations followed an "Agenda of Policy Questions" dated October 12, 1960, which had been prepared by Mr. Miller and the staff. In the course of the meetings the following policy decisions were made regarding Draft "D":

---

* Now Compact § 14.19

* * *

2) The compact should contain a paragraph holding private riparian rights free from impairment or interference. The Committee agreed to delete the last fifteen words of section 15.3, which read as follows: ". . . in the control, appropriation, use or distribution of water or any vested right acquired therein". It was also decided to refer the language to the lawyers for review.

Memo of New York Joing Legislative Commission on Interstate Cooperation

The Commission is to make future allocations of the waters of the Basin among the four states and their political subdivisions in accordance with the Supreme Court doctrine of equitable apportionment which takes into account alternative sources, relative needs and changing uses. However, it should be noted that no allocation by the Commission is perpetual, nor may it be deemed to constitute a prior appropriation of the water of the Basin. Nor does the compact change present law relating to riparian rights.

Statement of Solicitor, City of Philadelphia, before Subcomm. No. 1 of the Comm. on the Judiciary on H.J. Res. 225, 87th Cong., 1st Sess.

The most significant feature of the proposed compact is its provision for an interstate-Federal commission. The reservoirs, expertise, and meaningful function

of the four States together with those of the Federal Government make possible, in a unique merger, the orderly direction and planning and control of the water resources of the Delaware Basin. This does not mean that the Commission would supplant existing governmental and private operations in the basin. Nor does it mean that any infringement on private riparian rights will occur. Rather, its impact and modus operandi are that all future developments of the basin, by whatever agency or at whatever governmental level, shall be in accordance with the comprehensive plan and operated in harmony with all water uses.

Summary of Major Provisions of Compact in H.J. Res. 225, 87th Cong., 1st Sess.

C. Make future allocations of the waters of the basin among the four States: and their political subdivisions in accordance with the Supreme Court doctrine of equitable apportionment which takes into account alternative sources, relative needs, and changing uses (sec. 3.3). (No allocation by the Commission is perpetual, nor may it be deemed to constitute a prior appropriation of the water of the basin (sec. 3.3(b)). The compact does not change present law relating to riparian rights (sec. 14.19). Also, no action may be taken by any signatory State or by the Commission without unanimous consent of the parties to the U.S. Supreme Court decree in New Jersey v. New York (347 U.S. 995 (1954)), or by unanimous action of the Commission in any emergency, that would in any way interfere with the diversions and

compensating releases authorized by the Court in its 1954 decree.) (Sec. 3.3(a)).

S. Rep. No. 985, 87th Cong., 1st Sess.

Section 14.19 preserves rights of signatory parties relating to riparian rights.

APPENDIX 1

APPENDIX I

OFFICE OF THE MAYOR ABRAHAM D. BEAME

566-5090 220-76

For Immediate Release: Thursday, June 17, 1976

Mayor Abraham D. Beame today expressed his strong opposition to a bill that would empower the State Department of Environmental Conservation to take over control of the City's water supply to improve sport fishing conditions in upstate rivers and streams.

The bill would transfer from the City to the State Commissioner of Environmental Conservation the authority to control the volume and timing of water releases from New York City's upstate reservoirs.

* * *

Administrator Low noted that the City recently established a special task force which has been meeting every two

weeks with members of the State Environmental Conservation Department in an effort to provide better fishing conditions. He said:

"Owners of property along these streams have already been paid millions of dollars in settlements and condemnation awards for the reduction in flow necessitated by the construction of the City's reservoirs. In addition, we want to be good neighbors and want to insure good fishing conditions. We demonstrated this by agreeing to give more water than was provided for in the condemnation cases." (Emphasis supplied)

In expressing his opposition, the Mayor called attention to the City Corporation Counsel's opinion which states that the State of New York does not have the authority to take control over releases

from the three reservoirs in the Delaware River Basin.

These releases are under the control of a River Master appointed under a United States Supreme Court decree promulgated following extensive litigation involving the State of New York, the City of New York, New Jersey, Pennsylvania and Delaware.

The rights of the parties to the water of these three reservoirs are established in that Decree and it is the River Master who has control over releases into the Delaware River to maintain a prescribed flow at Montague, New Jersey.

APPENDIX J

APPENDIX J

N.Y. TIMES, 9/30/79, Col. 1, p. 36

A U.S. COURT UPSETS RULING AGAINST CITY

Asserts Pennsylvania Landowners Must Ask for Damages There In Dam Building Case

---

By RONALD SMOTHERS

The United States Court of Appeals last week reversed a lower-court decision that would have required New York City to pay damages to five Pennsylvania landowners who had maintained that city-owned dams on the Delaware River in upstate New York had adversely affected their property.

The appeals court decision in Philadelphia, according to Allen G. Schwartz, the City Corporation Counsel, could cancel a number of similar pending claims that eventually could have cost the city $15 million.

The ruling reversed a March 1978 decision by Judge Charles L. Brieant of Federal District Court, who found that the city's diversion of nearly 800 million gallons of water a day near the source of the 410-mile river for its water supply had diminished the recreational and commercial value of the Pennsylvania residents' property.

"Their rights of recovery, if any, lie against Pennsylvania," the appeals court said.

1931 Compact Held Binding

In awarding $350,000 in damages and interest to the five Pennsylvania landowners, the lower court ruling had spurred other suits that, Mr. Schwartz said, eventually could have involved 10,000 New Jersey and Pennsylvania property owners.

The three-judge appeals panel, however, found that a 1931 compact between New York State, New Jersey and Pennsylvania that allowed the construction of three dams on the river as it flows through New York State was binding on all citizens of Pennsylvania. The court said that the rights of the individual landowners to the waters of the Delaware "are not independent of Pennsylvania's rights but are derivative therefrom."

The 1931 agreement, entered into by Pennsylvania and approved by the United States Supreme Court, would be broken, the appeals court said, if individual citizens of the state were allowed to attack "the wisdom of policy changes made by their sovereign in the representation of all its citizens."

Under the 48-year old compact, New York was allowed to build the Cannonsville Dam near Stilesville on the west branch of the river that shortly after forms the boundary between New York and Pennsylvania. The agreement also allowed construction of the Pepacton Dam on the river's east branch near Downsville, N.Y.

The two branches converge at Hancock N.Y., and flow south, with the river still the boundary between New York and Pennsylvania, until it reaches Port Jervis, turns sharply and becomes the border between Pennsylvania and New Jersey. A third dam, the Neversink, was built on a tributary that joins the Delaware River at Port Jervis. The three dams provide 50 percent of the city's water.

The tristate compact requires that the city's diversion of water not exceed 800 million gallons a day and the impact of the diversion is measured by a rivermaster stationed at Montague, N.J. The rivermaster takes his measurements at a point several miles south of the three dams as well as downstream from the property of the five plaintiffs.

Changes Hurt Riverlife

Attorneys for the Pennsylvania landowners argued that the city practice of releasing water from points south and downstream of their property had assured the daily flow requirements at the measuring station but it did not assure them a minimum flow. The result, they said, was abrupt changes in the river flow at those points which had damaged trout fishing, canoeing and diminished the value of the Pennsylvania residents' property.

The lower court, according to Jack Weinberg, the lawyer representing one of the five plaintiffs, found that since New York State had seen fit to pay partial damages to New York residents across the

river from Pennsylvania who were adversely affected by the water release practices, it should also pay Pennsylvania residents. The lower court also found that the city practices had in fact adversely affected the quality of the river and violated the common law maxim that "property must be used in such a way as not to injure the property of others."

The appeals panel did not rule on whether the city had in fact damaged the river, but it instead upheld the primacy if the 1931 agreement. The panel noted that it was clear that, in negotiating the compact, Pennsylvania had been more concerned with maintaining a minimum river flow south and downstream of the area in which the five plaintiffs lived. It was that policy decision by the state, said the panel, which the landowners should take issue with.

Mr. Weinberg said that he and other attorneys representing the plaintiffs would decide later this week on whether to appeal.

APPENDIX K

APPENDIX K

City's Revenues From Water Charges, As Reflected In The Comptroller's Reports

Period	Amount of Water Charges
Fiscal 1977	$164,824,345.00
Fiscal 1975-76	$174,355,460.98
Fiscal 1974-75	$190,572,753.67
Fiscal 1973-74	$124,709,120.54
Fiscal 1972-73	$176,937,063.56
Fiscal 1971-72	$180,295,486.83
Fiscal 1970-71	$157,974,876.09

APPENDIX L

SUPREME COURT RECORDS

Report of the Special Master to this Court in New Jersey v. New York

It is true that in the argument of the case before me counsel for New York expressed the ability and willingness of the City of New York to pay damages to anyone injured in New Jersey, though at the same time denying that there would be any injury to anyone in New Jersey, or to anyone in New York owning property anywhere near the New Jersey line. The willingness, however, to pay compensation in New Jersey would not render lawful or rightful the taking of property or the injuring of property in New Jersey. In other words, one is not at liberty to injure another merely by showing an ability and willingness to pay damages. City of New York v. Pine, 185 U.S. 107. (Special Master's Report at 23)

* * *

The bill also alleges that the City has not changed its water rates since 1856, notwithstanding the increased cost of construction, operation and maintenance of water supply since that time. Nevertheless the bill alleges said City operates its water system at a profit, to-wit, a profit of more than $800,000.00 in 1925 and more than a million dollars in 1926.

New York City admits that it has not changed its water rates since 1856 and substantially admits the profits on the water system as alleged in the bill. (Special Master's Report at 41)

* * *

Connecticut v. Massachusetts Record

21. Answering the twenty-first paragraph, set forth on page 11 of the printed bill of complaint, the defendant, the Commonwealth of Massachusetts, denies each and every material allegation of fact contained in said paragraph. And further answering, the defendant says that any diversion of the flood waters of the Ware River and of such waters of the Swift River as the said Commonwealth plans to divert is within the sovereign and riparian rights of said Commonwealth and authorized by the laws of said Commonwealth and by the laws of the United States of America, and that in nowise is the State of Connecticut, as parens patriae or in its own right, or are the citizens of the State of Connecticut deprived of any of their rights or property, either contrary to law or without due process of law. And the defendant further alleges that by virtue of the provisions of the acts of the Great and General Court of the Commonwealth of Massachusetts, hereinbefore referred to, authorizing the said diversions, due and adequate pro-

vision is made for the payment of compensation, not only to citizens of the Commonwealth of Massachusetts but also to citizens of the State of Connecticut, who may suffer any damage by reason of the said diversion, whether such damage be suffered within the Commonwealth of Massachusetts or within the State of Connecticut; and the defendant further alleges that by the common law of the Commonwealth of Massachusetts, as set forth in the leading case of Manville Co. v. City of Worcester, reported in the 138th Massachusetts Reports, at page 89, a remedy is given not only to citizens of the Commonwealth of Massachusetts but to citizens of the State of Connecticut for damages suffered within their borders by virtue of any diversion authorized by the said Commonwealth. And the defendant says that the said remedies in the courts of the Commonwealth of Massachusetts at common law and by virtue of the acts of the Great and General Court, above referred to, constitute a full, sufficient, and adequate remedy at law which may be prosecuted by the State of Connecticut or any inhabitants thereof.

* * *

Hinderlider v. La Plata Record

1. Plaintiff's counsel seems to concede that this is not an action for damages, but is for injunction; and that no [fol. 78] judgment for damages can be rendered. As this action is brought by

the corporation only, while the principal damages (if damages should be recoverable) accrue to the individual farmers, separately, that concession of plaintiff's counsel seems to be right.